FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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DECISIONS

APRIL 1983

Commission Decisions

Administrative Law Judge Decisions

Commission Decisions

APRIL

The following cases were Directed for Review during the month of April:

Secretary of Labor, MSHA v. Consolidation Coal Company, WEVA 82-209-R, WEVA 82-245; (Judge Broderick, March 3, 1983)

Secretary of Labor, MSHA v. Mid-Continent Resources, Inc., WEST 82-174; (Judge Morris, February 28, 1983)

Secretary of Labor on behalf of Chester Jenkins v. Hecla-Day Mines, Corp., WEST 81-323-DM; (Judge Vail, March 14, 1983)

Secretary of Labor, MSHA v. Freeman United Coal Mining Co., LAKE 82-89; (Judge Broderick, March 16, 1983)

Review was Denied in the following cases during the month of April:

Secretary of Labor, MSHA v. Southern Ohio Coal Company, LAKE 80-142; (Judge Kennedy, March 14, 1983)

Secretary of Labor, MSHA v. Plateau Resources, Ltd., WEST 82-114-M; (Judge Kennedy, March 30, 1983)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

1730 K STREET NW, 6TH FLOOR
WASHINGTON, D.C. 20006

April 28, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA) on behalf of Gerald D. Boone v. REBEL COAL COMPANY	: : : : : : : : :	Docket No. WEVA 80-532-D

ORDER

On December 6, 1982, the U.S. Court of Appeals for the Fourth Circuit issued an order granting the Secretary of Labor's petition for enforcement of a final order of the Commission. Secretary of Labor and Gerald Boone v. Rebel Coal Co., NO. 82-1917, 4th Cir. In its order granting enforcement the Court stated:

> The court notes that with respect to back pay after October 9, 1981, the [Commission's final] order prescribes a formula but not a fixed total amount. In the event that the parties fail to agree on the proper recovery, their dispute should be resolved by the Commission with the right of judicial review to any party aggrieved by the Commission's resolution of such dispute.

By letter dated April 7, 1983, counsel for the Secretary of Labor requested that the Commission reassume jurisdiction over the case and assign it to an administrative law judge for the purpose of resolving the back pay issue referred to by the Court. The letter asserts that "no monies have been paid to Mr. Boone" pursuant to the Commission's final order, and that no agreement has been reached with respect to the amount of further back pay owed. The letter indicates that counsel for the operator was mailed a copy of the request for reassertion of Commission jurisdiction, but no response from the operator to the request has been received.

In view of the Court's order granting enforcement, the request by the Secretary, and the fact that no response has been received,

the request to reassume jurisdiction over this matter is granted. The case is remanded to the administrative law judge who previously heard this matter for expedited proceedings in compliance with the Court's order.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

A. E. Lawson, Commissioner

L. Clair Nelson, Commissioner

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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WASHINGTON, D.C. 20006

April 29, 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA)	:	Docket Nos. WEST 80-71-DM
	:	WEST 80-155-DM
EX REL. STEPHEN SMITH, DONALD HANSEN, THOMAS SMITH AND PATRICIA ANDERSON	:	WEST 80-156-DM
	:	WEST 80-165-DM
v.	:	
STAFFORD CONSTRUCTION COMPANY	:	

DECISION

These consolidated cases arise under the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (1976 & Supp. V 1981). Each case involves an alleged discriminatory discharge by the Stafford Construction Company in violation of section 105(c)(1) of the Mine Act. 1/

1/ Section 105(c)(1) provides:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner, representative of miners or applicant for employment in any coal or other mine subject to this Act because such miner, representative of miners or applicant for employment has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of miners at the coal or other mine of an alleged danger or safety or health violation in a coal or other mine, or because such miner, representative of miners or applicant for employment is the subject of medical evaluations and potential transfer under a standard published pursuant to section 101 or because such miner, representative of miners or applicant for employment has instituted or caused to be instituted any proceeding under or related to this Act or has testified or is about to testify in any proceeding, or because of the exercise by such miner, representative of miners or applicant for employment on behalf of himself or others of any statutory right afforded by this Act.

30 U.S.C. § 815(c)(1).

The administrative law judge held that Stafford Construction had unlawfully discharged Stephen Smith and Thomas Smith in violation of section 105(c)(1), but that it had lawfully discharged Donald Hansen and Patricia Anderson. 2/

We granted cross petitions for review filed by the Secretary and Stafford Construction. 3/ The issue in each of the cases before us is whether the judge's decision is supported by substantial evidence. For the reasons set forth below, we conclude that in each case it is and, accordingly, we affirm the judge's holdings in all three cases.

The Stephen Smith Case (WEST 80-156-DM)

Stephen Smith was employed by Stafford Construction as a D-9 bulldozer operator at the company's Cotter Mill project, where it was building a retention dam. Smith was hired on July 10, 1978, and he was discharged on December 20, 1978. His termination slip stated that he was being discharged as a result of a "reduction in force."

At the hearing, the Secretary alleged that Stephen Smith was discharged because of his involvement in safety matters at the project site, including Stafford Construction's belief that he was informing the Mine Safety and Health Administration ("MSHA") as to those safety matters. Stafford Construction defended principally on the ground that Smith was discharged as a result of a reduction in the company's work force, necessitated by the onset of winter. The judge rejected Stafford Construction's reduction-in-force defense, and held that the company violated section 105(c)(1) because it had discharged Stephen Smith for engaging in "protected activity." 3 FMSHRC at 2181. The protected activity referred to by the judge was Smith's involvement at the Cotter Mill project in safety complaints, which also led Stafford management to believe that he had reported safety problems to MSHA. 3 FMSHRC at 2179-82.

Based upon our review of the record, we conclude that substantial evidence supports the judge's holding of discriminatory discharge. First, it is undisputed that Stephen Smith was active in safety matters at the Cotter Mill project and that Stafford Construction was aware of his safety activity. Second, two of Stafford Construction's management officials testified that Smith was discharged because of his safety activity.

Donald Hansen, the assistant project manager at the time of Smith's discharge, stated that prior to the discharge he was involved in conversations with other management personnel concerning the reporting of safety-related information by company employees to MSHA. Tr. 671. Hansen recalled a conversation he had on that subject with Harold Stafford, the company president, and Everett Poynter, the project manager. Hansen testified:

2/ The judge's decision is reported at 3 FMSHRC 2177 (September 1981) (ALJ).

3/ The Secretary did not, however, seek review of the case involving Donald Hansen (WEST 80-71-DM).

> It was shortly after I became assistant project manager. I don't remember the exact date but Harold, myself and Mr. Poynter were having lunch, at which time, they were discussing someone within the employment was turning in complaints to MSHA as well as to the Operating Engineers Number 9.
>
> * * * * *
>
> Mr. Stafford told both myself and Mr. Poynter that if we find out who these individuals were, that we were to find a reason to terminate them immediately.

Tr. 671 (emphasis added). Hansen further testified that after Stephen Smith had been discharged, Poynter informed him, "[T]hat Mr. Smith was the individual who had been making complaints to MSHA and that Harold [Stafford] wanted him fired and that is the reason that he was terminated." Tr. 673 (emphasis added).

Likewise, Patricia Anderson, the company's secretary-bookkeeper at the Cotter Mill project, testified that prior to Stephen Smith's discharge she had both taken part in, and had overheard, several conversations involving management personnel in which the subject of employee safety complaints to MSHA was discussed. The first such conversation occurred approximately one week prior to Smith's discharge and involved her and Richard Schneider, the company's maintenance superintendent. Regarding that conversation, Anderson stated, "[Management] had determined that it was Mr. Smith who was informing MSHA of all the problems on the job" and "that being involved in informing MSHA of the accidents and problems that were going on the job, that he wouldn't be with the company." Tr. 189. Anderson also stated that Schneider had called Smith "a son-of-bitch and stuff like that" and that his passing information to MSHA "was costing him his job." Tr. 190, 192.

In addition, Anderson further testified that approximately one week prior to Smith's discharge she had a similar conversation with Harold Stafford, president of the company. Anderson stated, "He said just that Steve Smith was passing information to MSHA, and that they knew he was the one, and that he would be terminated, that they didn't tolerate that." Tr. 194. Anderson also credited Mark Jackson, the second shift foreman, with stating that it was Stephen Smith who was informing MSHA as to safety matters at the project site. Tr. 199.

Concerning Stafford Construction's business justification for the discharge, Anderson testified that the company was not in the process of a reduction in force at the time that Stephen Smith was discharged. Anderson, who kept the company's employment records at the Cotter Mill project, stated that she believed that the company was operating two shifts per day around that period of time and that it had also hired new employees. She further testified that there

were approximately 160 employees in January of 1979--the same number as there had been in December of 1978. (Smith was terminated on December 20, 1978.) Anderson added that both Harold Stafford and Donald Hansen informed her that the company had intended to work through the winter. Although the Cotter Mill project was shut down on January 5, 1979, because of a ground freeze (Tr. 181), Anderson testified that prior to that date there had been no decrease in the hiring of employees.

The foregoing evidence amply supports the judge's conclusion that Stephen Smith was fired because of his protected safety complaints and management's belief that he had reported safety problems to MSHA. The evidence also supports the judge's rejection of the reduction-in-force defense. Discriminating against a miner because of safety complaints violates the express prohibitions of section 105(c)(1) of the Mine Act. Even if Stephen Smith's first complaint to MSHA on December 20, 1978, was made shortly after the decision to fire him (3 FMSHRC at 2182), discrimination against a miner based on a mistaken belief that he has engaged in protected activity also violates section 105(c)(1) of the Act. Moses v. Whitley Development Corp., 4 FMSHRC 1475, 1480 (August 1982). Accordingly, we hold that substantial evidence supports the judge's decision that Stephen Smith was discharged in violation of the Mine Act.

The Thomas Smith Case (WEST 80-165-DM)

Thomas Smith was also employed by Stafford Construction as an equipment operator at the Cotter Mill project. (He is the brother of complainant Stephen Smith). Thomas Smith was discharged on January 5, 1979, purportedly for negligently breaking the lift arm on a No. 16 motorgrader. At the hearing, Thomas Smith claimed that the real reason why he was discharged was because he and his brother, Stephen, had filed a safety complaint with MSHA on December 20, 1978.

The judge held that Thomas Smith was unlawfully discharged by Stafford Construction for filing the safety complaint with MSHA on December 20, 1978, a protected activity. 3 FMSHRC at 2184, 2187. The judge rejected, as pretextual, Stafford Construction's defense that Smith was discharged because he had negligently damaged the motorgrader. 3 FMSHRC at 2186-87.

We hold that substantial evidence supports the judge's decision that Thomas Smith was discharged in violation of section 105(c)(1). The record establishes that Smith was active in safety matters at the Cotter Mill project. During the months of September, October and November of 1978, Smith had made four or five oral safety complaints to management personnel. Tr. 746-47. Specifically, he complained about insufficient lighting on the bulldozer that he was operating, as well as a short smoke stack that was causing smoke to blow in his face. Smith also filed, along with his brother, a written safety complaint with MSHA on December 20, 1978. Thomas Smith's signature is on the complaint, and it was shown to other workers at the Cotter Mill project on the morning of December 20.

In addition, the record establishes that contrary to the contentions of Stafford Construction, Thomas Smith was instructed by his supervisor to operate the motorgrader in the area where the lift arm was broken. Furthermore, Smith had been operating the motorgrader in that area for approximately two hours before the accident occurred. As found by the judge, Stafford Construction's discharge of Smith was inconsistent with its past practice of discharging employees for gross negligence only, which was not the case here. See 3 FMSHRC at 2185-87. This disparate treatment strongly suggests that the explanation offered by Stafford Construction for discharging Smith was a pretext.

Finally, the testimony of Donald Hansen, the assistant project manager at the time of Smith's discharge, evidences the animus that Stafford Construction maintained toward employees who engaged in safety activity at the project site. Hansen testified that Harold Stafford, the company president, in referring to Thomas Smith stated, "There is the SOB who is causing us a lot of -- whose brother is causing us a lot of problems, and if you get a chance, fire him." Tr. 848. The problems referred to by Harold Stafford were the safety complaints that were being filed with MSHA.

In sum, the record establishes that Thomas Smith was active in safety matters and that he had filed a safety complaint with MSHA on December 20, 1978. It also establishes that Stafford Construction took a dim view of such safety activity and that the reason offered by Stafford Construction for Smith's discharge were pretextual. Accordingly, for the reasons mentioned above, we affirm the judge's holding that Thomas Smith was unlawfully discharged in violation of section 105(c)(1).

The Patricia Anderson Case (WEST 80-155-DM)

Patricia Anderson began working for Stafford Construction as a secretary-bookkeeper at the company's Cotter Mill project in June of 1978. She was discharged in February of 1979. The reason given by Stafford Construction for her discharge was incompetence.

Anderson maintained that she was discharged because she had refused to lie to the MSHA representatives who were investigating Stephen Smith's discrimination complaint. Specifically, Anderson claimed that she was asked by Harold Stafford to tell the MSHA investigators that Stephen Smith was discharged as part of a reduction in force, even though the company records did not reflect that a reduction in force took place. Anderson was fired two weeks after she told Harold Stafford that she could not tell MSHA that the company had undergone a reduction in force.

The judge held that Anderson was lawfully discharged. 3 FMSHRC at 2198. He stated that Stafford Construction did not interfere with Anderson's right to provide a statement to MSHA in its investigation

of Stephen Smith's complaint and that her discharge was in no way connected to her statement to Harold Stafford that she could not tell MSHA that Stephen Smith was terminated as part of a reduction in force. 3 FMSHRC at 2197. Accordingly, the judge did not reach the issue of Anderson's competence.

The resolution of this case depends in large measure upon the testimony of Anderson regarding the events of January 30, 1979. Two separate meetings were held that evening as Stafford Construction management personnel prepared for interviews to be conducted the next day by the MSHA representatives investigating Stephen Smith's discrimination complaint. At the first meeting, Patricia Anderson and Richard Schneider, the maintenance superintendent, reviewed employee files and compiled a list as to the dates of employee terminations and the reasons for their termination.

Anderson was called to a second meeting of Stafford Construction management personnel that evening. Harold Stafford, the president of the company, was present at that meeting. Anderson testified that the purpose of that second meeting was to instruct her as to what to tell the MSHA investigators the next day. She stated that at the meeting she was asked to tell MSHA that Stephen Smith was discharged due to a reduction in force. Anderson testified that she told Harold Stafford that she couldn't lie -- that she couldn't tell MSHA that there had been a reduction in force. She added that Harold Stafford then told her to say whatever she wanted to MSHA. Tr. 1348-49.

The judge stated that the only testimony regarding the subject of lying to MSHA was the gratuitous statement of Anderson that she couldn't lie. 3 FMSHRC at 2197. Moreover, the judge noted that Anderson admitted that she was not specifically asked to lie by Harold Stafford (Tr. 1375-76). Id. The judge concluded, therefore, that Anderson's subsequent discharge was in no way connected to her statement to Harold Stafford that she would not tell the MSHA investigators that Stephen Smith was discharged as a result of a reduction in force.

We agree with the judge's treatment of Anderson's testimony. Although Anderson may have perceived Harold Stafford's request that she provide MSHA with a statement that a reduction in force had taken place as a request that she lie to the MSHA investigators, her testimony clearly establishes that such was not in fact the case. Harold Stafford did not ask Anderson to lie to the MSHA investigators. In fact, Anderson credits him with telling her to say whatever she wanted to MSHA. Further, as the judge found, the record does not show that Harold Stafford's reliance on the reduction-in-force defense was in bad faith. 3 FMSHRC at 2197. Finally, as the judge also noted, she was fired nearly two weeks after these meetings, and was not then preparing to testify, nor had she testified in the case. 3 FMSHRC at 2198.

In sum, the record does not support Patricia Anderson's claim that she was discharged in retaliation for her refusal to lie to MSHA. The only protected activity that the Secretary argued below, and the judge considered, was her right to testify truthfully. Therefore, she failed to establish a prima facie case that her discharge was, at least partially, motivated by protected activity on her part. Accordingly, we affirm the judge's holding that Anderson's discharge did not violate the Mine Act.

Rosemary M. Collyer, Chairman

Richard V. Backley, Commissioner

Frank F. Jestrab, Commissioner

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L. Clair Nelson, Commissioner

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Administrative Law Judge Decsiions

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 1 1983

FMC CORPORATION,	:	Contest of Citation
Contestant-Respondent	:	
	:	Docket No. WEST 82-146-RM
v.	:	Citation No. 577552; 3/10/82
	:	
SECRETARY OF LABOR,	:	Civil Penalty Proceeding
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No. WEST 82-207-M
Respondent-Petitioner	:	A/O No. 48-00152-05501
	:	
	:	FMC Mine

DECISION

These matters came on for a hearing on the parties' stipulation of material facts not in dispute and supplementary testimony. The dispositive issue is whether the agreed upon facts show that 9.5 pallets of Anfo, a blasting agent, was in "storage" as that term is used in the mandatory safety standard set forth in 30 C.F.R. 57.6-5 at the time the challenged citation was written.

Findings

At approximately 8:05 a.m., Wednesday, March 10, 1982, shortly after the beginning of the day shift at the FMC Mine, Gary Hornsby, the foreman in charge of hauling, supervised the unloading of forty-two, 50 pound bags of an explosive, Anfo, in the storage yard of the #3 shaft. By happenstance the area in the yard where the Anfo was unloaded to await further movement underground was within 8 feet of a 500 gallon portable oil dispensing tank. This tank was, at the time, full of hydraulic fluid, a combustible. A small amount of the hydraulic fluid was spilled under the tank.

It was the operator's regular practice to unload Anfo in the yard of the #3 shaft prior to transporting it to the shaft and dispatch to the face areas of the mine. Normally the Anfo was moved from the yard into the underground areas of the mine by 1:00 p.m. of the day it arrived.

30 C.F.R. 57.6-5 provides in pertinent part that:

> Areas surrounding . . . facilities for the storage of blasting agents shall be kept clear of rubbish, brush, dry grass, or trees (other than live trees more than 10 feet tall), for a distance of not less than 25 feet in all directions, and other unnecessary combustible materials for a distance of not less than 50 feet.

30 C.F.R. 57.6-43 provides:

> Vehicles containing explosives of detonators shall be posted with proper warning signs.

30 C.F.R. 57.6-65 provides:

> Vehicles containing detonators or explosives, other than blasting agents, shall not be left unattended except in blasting areas where loading or charging is in progress.

At approximately 9:40 a.m., a Federal Mine Inspector observed the Anfo sitting in the yard of the #3 shaft next to the tank of hydraulic fluid. He was immediately concerned that the explosive was located so near an "unnecessary combustible," the tank of hydraulic fluid.

The inspector immediately called the condition to the attention of the foreman, Mr. Hornsby, and at 10:15 a.m. wrote a 104(a), S&S citation that charged a violation of 30 C.F.R. 57.6-5 only. The citation stated:

> There were approx. 9-1/2 pallets of ammonium nitrate fuel oil blasting agent stored in the #3 Shaft storage yard. These pallets were about 8 feet from a 500 gal. portable oil dispensing tank. This tank was checked and found to be full of hydrolic oil. There was also a small accumulation of oil under this tank. There were no explosive signs in the area and the blasting agents were not attended. Each pallet contains 42 bags of blasting agent, each weighing 50 pounds.

The portable oil tank was removed immediately. In addition, guards were stationed and the Anfo posted with "Danger Explosives" signs. Thus, the condition was abated within an hour and a half after the Anfo was unloaded in the yard.

Conclusions

The operator contends the area identified in the citation was not a "facility for storing blasting agents" within the meaning of the standard because the Anfo was in transit for use in the underground areas of the mine. The Secretary, on the other hand, claims that the fact that the Anfo was unloaded in the storage yard awaiting further movement to the underground face areas and that it was the regular practice of the operator to handle the Anfo in this manner for periods up to five or six hours created a hazard against which the standard was directed, namely, the occasion for the placement of explosives in close proximity to unnecessary combustibles.

Both parties seek to make a fortress of the dictionary. Words, of course, are but the skin of living thoughts and must be assigned meanings in the real world consonant with the physical context fairly envisioned at the time of their utterance. There is no dispute about the fact that the yard of the #3 Shaft was a "facility" or that it was used as a holding area for materials intended for use in the underground parts of the mine. All storage connotes a temporary placement awaiting further movement or transport to the place of ultimate rest or use.

It is true, as the operator points out, that the impermissible storage here was relatively brief. But the point is that even during that brief period, an hour and a half, the Anfo was within an impermissible proximity to the combustible hydraulic fluid. I find, therefore, that for that period of time the Anfo was in impermissible storage within the meaning of the standard cited and that the violation charged did, in fact, occur.

I further find that the additional conditions cited, namely, the absence of a guard or danger signs were not a violation of the 30 C.F.R. 57.6-43 or 57.6-65 inasmuch as the explosives were not on a vehicle.

Order

Accordingly, it is ORDERED that (1) the validity of the citation be, and hereby is, AFFIRMED; and (2) that in accordance with the parties' stipulation the amount of the penalty warranted is $119.00. It is FURTHER ORDERED that the operator pay the penalty assessed on or before Friday, April 15, 1983 and that subject to payment the captioned matters be DISMISSED.

Joseph B. Kennedy
Administrative Law Judge

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APR 4 1983

JAY MONTOYA, Complainant	:	COMPLAINT OF DISCHARGE, DISCRIMINATION, OR INTERFERENCE
v.	:	
VALLEY CAMP OF UTAH, INC., Respondent	:	Docket No. WEST 82-41-D
	:	DENV CD 81-21
	:	Belina No. 2 Mine

DECISION

Appearances: John L. Lewis, Esq. and Thomas Cerruti, Esq., Jones, Waldo, Holbrook & McDonough, Salt Lake City, Utah, for Complainant;
John A. Snow, Esq., Van Cott, Bagley, Cornwall & McCarthy, Salt Lake City, Utah, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Jay Montoya under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801, et seq., the "Act," alleging that Valley Camp of Utah, Inc., (Valley Camp), unlawfully issued a written reprimand to him on February 13, 1981, contrary to section 105(c)(1) of the Act. 1/ Mr. Montoya further alleges that because Valley Camp refused to withdraw the alleged unlawful reprimand, he was compelled to resign under protest

1/ Section 105(c)(1) provides in part as follows:

> No person shall discharge or in any manner discriminate against or cause to be discharged or cause discrimination against or otherwise interfere with the exercise of the statutory rights of any miner * * * in any coal * * * mine subject to this Act because such miner * * * has filed or made a complaint under or related to this Act, including a complaint notifying the operator or the operator's agent, or the representative of the miners of the coal * * *mine of an alleged danger or safety or health violation in the coal * * * mine * * * or because of the exercise by such miner * * * on behalf of himself or others of any statutory right afforded by this Act.

on June 10, 1981. He claims that his resignation and his refusal to return to work were the result of fears for his safety and fears of future harassment through contrived infractions that would be used to set up a discharge "for cause". He argues, accordingly, that his resignation was a constructive discharge caused by the unlawful reprimand and cites supportive decisions under the National Labor Relations Act. 2/ Evidentiary hearings were held on Mr. Montoya's complaint on December 15 and 16, 1982, in Salt Lake City, Utah.

Motion to Dismiss

Valley Camp argues as a preliminary matter that the Complainant had failed to meet the time deadlines set forth in sections 105(c)(2) and 105(c)(3) of the Act. Under section 105(c)(2), if the miner believes that he has been unlawfully discharged, interfered with, or otherwise discriminated against, he may, within 60 days after the alleged violation occurs, file a complaint with the Secretary of Labor asserting such unlawful acts. The relevant legislative history provides in part as follows:

> While this time-limit is necessary to avoid stale claims being brought, it should not be construed strictly when the filing of a complaint is delayed under justifiable circumstances. Circumstances which could warrant the extension of the time-limit would include a case where the miner within the 60-day period brings the complaint to the attention of another agency or to his employer, or the miner fails to meet the time-limit because he is misled as to or misunderstands his rights under the Act.

S. Rep. 95-181, 95th Cong., 1st session, 36th (1977), reprinted in Senate Subcommittee on Labor, Committee on Human Resources, 9th Congress, 2nd session, Legislative History of the Federal Mine Safety and Health Act of 1977, at 624 (1978), ("Legis. Hist."). See Herman v. Imco Services, 4 FMSHRC 2135 (1982). Prejudice to the operator caused by the delay is also a factor to be considered. Herman, supra.

The specific issue to be decided, then, is whether appropriate circumstances exist in this case that would justify an extension of the filing deadline set forth in section 105(c)(2) and whether the operator has been prejudiced by the delay. The operator as the moving party and

2/ NLRB v. Waples-Platter Co., 140 F. 2d 228 (5th Cir. 1944); Caroll Egg Co., Inc. and Amalgamated Meat Cutters and Butcher Workmen of North America, 130 NLRB 100 (1961), Cavalier Olds., Inc. and Professional Automobile Association, 172 NLRB 96 (1968), and M.R. Products, Inc. and International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, 179 NLRB 17 (1969).

proponent of the statutory limitation period carries the burden of establishing that the Complainant is barred by those provisions. 5 U.S.C. § 556(d); Raymond v. Eli Lilly & Co., 412 F. Supp. 1392, at 1401 (DCNH, 1976).

In this case, it is undisputed that the initial act of alleged discrimination occurred on February 13, 1981, when Mr. Montoya was issued the written reprimand at bar (Ex. O-3). Moreover, it is clear that Mr. Montoya did not file his formal complaint of discrimination with the Federal Mine Safety and Health Administration until August 19, 1981, more than 6 months later. (Ex. C-9). The record in this case also shows, however, that as early as March 12, 1981, Montoya brought his complaint to the attention of his employer (Ex. C-10). In a letter of that date received by the employer shortly thereafter, Montoya asserted the allegations now raised with sufficient clarity so as to have placed Valley Camp on notice of the complaint herein.

Mr. Montoya testified that in composing this letter, he relied upon a copy of regulations received when he first worked for Valley Camp and which set forth procedures for filing complaints of discrimination (Ex. C-12). While the particular regulations relied upon concern discrimination complaints under the Surface Mining and Reclamation Act, the testimony of the Complainant is credible at least to the extent that it demonstrates reasonable good faith efforts to promptly assert his rights within his limited knowledge and capacities. It is also apparent that Mr. Montoya did file a complaint with the Federal Mine Safety and Health Administration promptly upon learning that that was the proper agency with which to file. Within this framework and in the absence of evidence of prejudice to the operator caused by the filing delay, I find that extension of the time limit set forth in section 105(c)(2) is warranted. Mr. Montoya's complaint filed August 19, 1981, is accordingly deemed to have been timely filed.

Under section 105(c)(3) of the Act, the miner has the right, within thirty days of notice of the Secretary's determination that the Act has not been violated, to file an action in his own behalf before the Commission. In this case, the Secretary notified Mr. Montoya of its determination by letter dated October 19, 1981 (apparently received by the Complainant on November 3, 1981), and Mr. Montoya filed his request for review by the Commission on November 17, 1981. I find therefore that Mr. Montoya has, in fact, complied with the filing requirements under this section of the Act. For the above reasons, the operator's Motion to Dismiss is denied.

The Merits

In order to establish a prima facie violation of section 105(c)(1) of the Act, the Complainant must prove by a preponderance of the evidence that he has engaged in an activity protected by that section and

that he has suffered discrimination, interference, or discharge, which was motivated in any part by that protected activity. Secretary, ex rel. David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), reversed on other grounds, sub nom, Consolidation Coal Co. v. Secretary, 663 F. 2d 1211 (3rd Cir. 1981).

In this case, there is no dispute that Mr. Montoya had engaged in protected activities. On February 9, 1981, Montoya was on the 4 p.m. to midnight shift working as a miner operator at the face of the No. 2 entry of the first east mains section. The miner helper had previously warned Montoya of "bad" roof in that entry and Montoya had, in turn, complained about this to his foreman, Roy Tellerico. Although Tellerico did not agree that the roof was bad, he apparently agreed nevertheless to insert "I" beams to buttress the roof to satisfy Montoya. With the understanding that "I" beams would later be inserted, Montoya finished cutting the face that day. He was apparently injured the next day for reasons unrelated to the roof condition and was unable to return to work until February 13.

The "I" beams were still not in place when Montoya arrived at the No. 2 entry on February 13. Someone in the section again warned Montoya about the "bad" roof and Montoya claims that he tested the roof near the face himself by "thumping" it. It sounded hollow and debris sifted from the roof. Foreman Tellerico again disagreed with Montoya about the safety of the roof. Montoya consulted the Mine Safety Committeeman Clarence Denny. Denny also thought the roof was dangerous and told Montoya that if he refused to work under it, "he would back him on it." Denny could see that the roof was separating from the ribs and the roof sounded hollow, indicating to him a dangerous separation. Denny agreed that they indeed needed cross bars for additional roof support.

Cameron Montgomery also saw the roof conditions in the No. 2 entry at that time. According to Montgomery, three other miners also agreed with him that it was "bad top". Another union safety committeeman, Joseph Haycock, shift foreman Joe Tiller, and foreman Joe Tellerico later tested the roof and concluded it was safe. Valley Camp does not, however, dispute that the circumstances in this case were sufficient to show that Complainant's work refusal was based upon a good faith, reasonable belief that the roof condition was hazardous and that his work refusal therefore constituted a protected activity within the scope of section 105(c)(1). See Robinette v. United Castle Coal Co., 3 FMSHRC 1803 (1981). Valley Camp also acknowledges that the Complainant's report of unsafe working conditions constituted a protected safety complaint within the scope of that section.

The second element of a prima facie case is a showing that the adverse action (here, the issuance of a written reprimand and the alleged constructive discharge) was motivated in any part by the protected activity. In support of his position that Valley Camp was unlawfully motivated by his protected activity, Montoya alleges that management

had knowledge of his protected activity, that management showed hostility towards that protected activity, that there was a close proximity in time between the protected activity and the adverse action, and that the adverse action was disproportionate to the violation alleged in the reprimand.

The evidence shows that when the Complainant refused to work under the roof at the No. 2 face, Shift Foreman George Tiller directed him and another miner, Cameron Montgomery, to perform alternate work. Ten or fifteen minutes later, Tellerico told Montoya to tram the continuous miner to the No. 4 entry. Tiller and Tellerico walked about 30 feet ahead of the miner as it was trammed. Montoya testified that as he turned into the No. 4 entry, he asked Tellerico to check for gas and thought Tellerico agreed to do so. 3/ With this alleged understanding, the Complainant trammed the miner into the last open crosscut. George Tiller, who was not a party to the alleged "understanding", saw the miner pass the last open crosscut without the necessary gas check and ordered the Complainant to turn off the miner. He threatened to issue a written reprimand for his failure to check for methane. A heated exchange ensued, ending only when the Complainant insisted on leaving the mine, claiming that he was suffering from a previously fractured thumb and a cold.

Shift Foreman Tiller subsequently issued a written reprimand to Montoya for passing the last open crosscut without performing the required methane test. According to the uncontradicted evidence, it was not out of the ordinary to have done so, and, indeed, Tiller had given a written reprimand to his own brother-in-law not long before the incident herein for the same type of violation. Moreover, during that same year, he had issued some ten to twelve oral reprimands and three written reprimands. Virgil Lam, Mine Superintendent, testified without contradiction that he, too, had on past occasions issued reprimands for miners failing to make methane gas checks.

On the next work day, February 16, 1981, the Complainant filed a grievance over the threatened reprimand with Grant Howell, the Chairman of the mine committee. A meeting was held on the Complainant's grievance a short while later. Present were the Complainant, General Mine Foreman Virgil Lam, Shift Foreman George Tiller, President of the union local, John Herinson, and the two mine safety committee chairmen, Haycock and Denny. According to Howell, Montoya initially claimed that he had not trammed the miner beyond the last open crosscut but finally admitted that he indeed committed the violation and deserved a reprimand. The grievance was dismissed and no appeal was taken.

3/ Tellerico testified that Montoya did indeed ask him to perform the methane test, but he told Montoya to do it himself. Particularly in light of the credible testimony (discussed infra) that Montoya had admitted at his grievance meeting that he in fact did tram the miner beyond the last open crosscut without the required tests, I cannot believe his contrary testimony at this hearing.

John Herinson, the local union president, recalled, based on notes taken at the meeting, that Montoya at first insisted that he had not passed the last open crosscut but, after looking at the mine map, admitted the violation and agreed that he deserved a reprimand. Herinson also thought the reprimand was appropriate because the violation endangered the safety of all miners. Particularly because of Herinson's position as union president and the fact that he availed himself of notes taken at the grievance meeting, I accord his testimony great weight.

Evidence that Complainant's work refusal and safety complaints were made in the presence of Shift Foreman George Tiller, that Mr. Tiller was admittedly "irritated" and "angered" by the fact that miners were idled as a result of this work refusal and the brief time lapse between the work refusal/safety complaint and the events triggering the reprimand is indeed suggestive that the reprimand may have been issued at least in part because of the protected activities. From this evidence, it could be inferred that the reprimand to Mr. Montoya was at least partially motivated by his protected activities.

Even assuming, however, that Montoya had therefore established a prima facie case under Pasula, that would not be the end of the matter. The Commission also stated in Pasula that the employer may affirmatively defend against such a case by proving by a preponderance of all the evidence that, although part of its motivation was unlawful, (1) it was also motivated by the miner's unprotected activities, and (2) it would have taken adverse action against the miner in any event for the unprotected activities alone. 2 FMSHRC at 2799-2800.

I have already found that the credible evidence supports the conclusion that Mr. Montoya did in fact tram the miner past the last open crosscut without performing the necessary methane tests (fn. 3 supra.). Based on the credible testimony of Union President Herinson, I also find that this constituted a serious violation, endangering the safety of all the miners. Finally, based on the undisputed testimony of Shift Foreman George Tiller and Mine Superintendent Virgil Lam, I conclude that the issuance of a written reprimand under these circumstances was not out of the ordinary and clearly not disproportionate or discriminatory. Both of these officials had previously issued reprimands to miners for failing to make methane gas checks and indeed Tiller had given his own brother-in-law a written reprimand for just such a violation only a short time before Montoya's.

In conclusion, I find that even assuming Valley Camp's agent, George Tiller, had a "mixed motivation" in issuing a written reprimand against Mr. Montoya, there were credible "business justifications" for

the reprimand exclusive of any protected activities and I find that he would have issued that reprimand in any event for Mr. Montoya's unprotected activities alone. Pasula, supra. Since the reprimand itself was not unlawful, Mr. Montoya's resignation or "constructive discharge" because of that reprimand was likewise not unlawful. Accordingly, the Complaint herein is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 5 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDINGS
Petitioner,	)	DOCKET NO. WEST 79-14-M
	)	WEST 79-331-M
v.	)	WEST 79-362-M
	)	WEST 79-363-M
N. A. DEGERSTROM, INCORPORATED,	)	
Respondent.	)	

Appearances:

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For the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, (MSHA), charges respondent, N.A. Degerstrom, Incorporated, (Degerstrom), with violating safety and health regulations promulgated under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing was held in Spokane, Washington on January 30, 1980. At the conclusion of the hearing the Secretary moved for a continuance in order to conduct a feasiblity study of respondent's equipment involved in the citations. Respondent consented to the motion and the hearing was adjourned (Tr. 134, 135, 215, 216). On September 23, 1981, the hearing was resumed and concluded.

The parties filed post trial briefs.

Issues

The principal issues involve the construction of the noise exposure regulation. Such issues may be resolved by several cases now pending on review before the Commission. These include: Callahan Industries, Inc., York 79-99-M and Todilto Exploration Co., CENT 79-91-RM.

Summary of the Decision

Three of these four consolidated cases involve alleged violations of the excessive noise standard. The principal fact issues are in WEST 79-362-M. Accordingly, that case will be initially reviewed.

The succeeding noise case, WEST 79-14-M, is relatively less complex. WEST 79-331-M ultimately was settled at the second hearing.

The fourth case, WEST 79-363-M, involves two alleged violations of the fire extinguisher regulation.

The resolution of the several credibility issues in the cases is apparent in the context of the decision.

Stipulation in all Cases

The parties stipulated as follows: respondent, a corporation, operated State Pit G-T-175, Theatre Pit, and State Pit PWS-48 as an operator. Further, the operation of these pits involves materials, products, or goods brought to respondent from points outside of the State of Washington.

In addition the parties agreed that dosimeters used by the MSHA inspectors were properly calibrated and when operated properly they give accurate readings of noise levels.

Further, respondent's income averaged seven or eight million dollars a year for the four years before the hearing; further, respondent has employed, on the average, 120 employees (Tr. 6-7).

If respondent pays the proposed penalties it will not have the effect of putting the company out of business (Tr. 8).

Respondent has shown good faith by doing what it could do to achieve compliance by the proposed abatement date (Tr. 8).

WEST 79-362-M

In this case the Secretary issued his citations numbered 346416, 346417, and 346418 under Section 104(a) of the Act. He alleges Degerstrom violated 30 C.F.R. 56.5-50(b), in that it permitted its Terex bulldozer operator, its primary crusher operator, and its plant oiler to be exposed to excessive concentrations of noise.

The cited section, in Title 30, Code of Federal Regulations, Section 56.5-50 provides as follows:

> 56.5-50 Mandatory. (a) No employee shall be permitted an exposure to noise in excess of that specified in the table

below. Noise level measurements shall be made using a sound level meter meeting specifications for type 2 meters contained in American National Standards Institute (ANSI) Standard S1.4-1971, "General Purpose Sound Level Meters," approved April 27, 1971, which is hereby incorporated by reference and made a part hereof, or by a dosimeter with similar accuracy. This publication may be obtained from the American National Standards Institute, Inc., 1430 Broadway, New York, New York 10018, or may be examined in any Metal and Nonmetal Mine Safety and Health District or Subdistrict Office of the Mine Safety and Health Administration.

PERMISSIBLE NOISE EXPOSURES

Duration per day hours of exposure	Sound level dBA, slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

No exposure shall exceed 115 dBA. Impact or impulsive noises shall not exceed 140 dB, peak sound pressure level.

NOTE: When the daily noise exposure is composed of two or more periods of noise exposure at different levels, their combined effect shall be considered rather than the individual effect of each.

If the sum

$$(C_1/T_1)+(C_2/T_2)+ \ldots (C_n/T_n)$$

exceeds unity, then the mixed exposure shall be considered to exceed the permissible exposure. C_n indicates the total time of exposure at a specified noise level, and T_n indicates the total time of exposure permitted at that level. Interpolation between tabulated values may be determined by the following formula:

$$\text{Log } T=6.322 - 0.0602 \text{ SL}$$

Where T is the time in hours and SL is the sound level in dBA.

(b) When employees' exposure exceeds that listed in the above table, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce exposure to within permissible levels, personal protection equipment shall be provided and used to reduce sound levels to within the levels of the table.

Petitioner's Evidence

Citation 346416
Terex Bulldozer Operator

On July 13, 1978 Elvin Fischer, an MSHA inspector experienced in mining, inspected Degerstrom at State Pit PSW 48. This was a small normal crusher operation employing 23 men working two shifts. He conducted his noise test by placing a DuPont dosimeter on the operator of the Terex bulldozer for eight hours and twenty minutes (Tr. 59-63, 76). The diesel dozer, the second largest available, is similar to the Caterpillar D-8 bulldozer (Tr. 62, 63). The principal noise sources on the Terex are: The engines, the tracks, the transmissions, and the transfer case (Tr. 63). At the time of the inspection the dozer was backing downhill into a pit, picking up material, and then pushing it uphill into the hopper (Tr. 63).

The calibrations of the dosimeter are checked periodically at the MSHA Lab. Driscoll (superintendent) was present when the inspector removed the readout from the dosimeter. The readout, which is in digital form, indicated the noise exposure was 1152 percent of the permissible limits. This exposure translates to 108 dBA (Tr. 64). According to MSHA's regulation the permissible limit here would be 90 dBA (Tr. 64). Only the dozer operator was in the immediate vicinity. The MSHA inspector didn't see any administrative or engineering controls being used (Tr. 65).

The inspector also accompanied the dozer operator on several round trips and took readings with a sound level meter. Such a device gives an instant reading in dBA rather than measuring in percentages of exposure. The inspector during the trips with the dozer operator held the sound level meter near the operator's ear (Tr. 58-60, 68, 69). Both the sound level meter and the dosimeter meet the specifications required by 30 C.F.R. 56.5-50 (Tr. 71).

On the Terex dozer Inspector Fischer expected to see some acoustical equipment or sound barriers around the operator. But he couldn't say what the effect of controls would be unless he measured the noise level with a dosimeter (Tr. 77-78).

Citation 346417
Primary Crusher Operator

The inspector placed the dosimeter on the crusher operator. At the time of the inspection large rocks one and a half to two feet in diameter

were being crushed (Tr. 66, 67). The noise exposure readout was 478 percent. This translates to 101 dBA. The crusher operator was tested for 8 hours and 25 minutes (Tr. 69, 92). The maximum exposure listed in the regulation is 90 dBA (Tr. 69-70). The crusher operator could not retreat into a booth or enclosure (Tr. 70).

Citation 346418
Plant Oiler

The plant oiler for Degerstrom also serves as the cleanup man. He removes the spillage from the conveyor belts. He oils and greases the machinery during "down time" (Tr. 72).

The dosimeter indicated the oiler was exposed at 313 percent of the permissible noise limit. This exposure translates to 98 dBA. The testing equipment was on the oiler for eight hours and ten minutes. Under the regulation 90 dBA is a permissible limit (Tr. 72, 73).

At the closing conference Hubner, the company engineer, indicated to the inspector that he was aware of the overexposure to the noise (Tr. 73-74). But he thought that the use of personal protective equipment was adequate (Tr. 74). No one indicated administrative or engineering controls were being used (Tr. 74).

All of the workers tested by Inspector Fischer were wearing personal protective equipment consisting of ear muffs or ear plugs (Tr. 80). Witness Fisher writes a citation if there is exposure over the TLV [threshold limit value] (Tr. 86).

MSHA'S Evidence Concerning Feasibility

MSHA's health specialist Kenneth High testified that noise reduction controls for the bulldozer include: an improved muffler, extending the exhaust pipe, lining the ROPS and treating the firewall with acoustical material. In addition, a windshield or sound barrier around the operator could reduce the noise level, as could floor mats extended over the fenders (Tr. 108-109). Portable sound barriers are commercially available (Tr. 109). It would probably cost $700 to $2,500 to install partial barriers. A D-10 cab costs $5,000 to $27,000 (Tr. 110). A cab will have the effect of reducing the noise level to within permissible limits, and it will also attenuate the dust (Tr. 111). In High's opinion 75 percent of all dozers can reach compliance (Tr. 111).

Reductions of 5 to 14 dBA and 8 to 12 dBA can be accomplished by installing various engineering controls on dozers. The net reduction

depends on many factors, including the workmanship of the installation (Tr. 130-132). The cost of dozer modifications in some instances runs as low as $700 to $1,400. However, Inspector High could not state if his suggestions would bring the dozers into compliance. He would have to verify the results (Tr. 133).

In the opinion of witness Fischer his recommended treatment of the engine transmission would cost $180 to $200 (Tr. 271). He also states that the extension of the muffler, the changes to the engine transmission and the recommended change in the cooling fan would not bring the dozer within permissible limits (Tr. 271, 272). On dozers MSHA gets an average reduction of around 4 decibels, plus or minus one decibel (Tr. 272). It is feasible if such a reduction can be attained even though the changes do not bring the equipment within the 90 dBA range for eight hours (Tr. 272).

On June 10-12, 1980, John Rabius, an MSHA industrial hygienist experienced in his field, conducted a noise survey at the Degerstrom site (Tr. 232-235, 237). If MSHA has the materials available and the company has the time and the equipment MSHA will work on the noise sources to devise controls (Tr. 236).

In witness Rabius's opinion an expenditure of $1,000 could reduce a bulldozer noise level four or five decibels (Tr. 273-274). During tramming, the normal operating mode of the dozer, witness Rabius believed they could obtain a four or five decibel reduction (Tr. 277). MSHA didn't test any of its controls here. But MSHA offered to do so and Degerstrom seemed receptive (Tr. 275).

Administrative controls, according to Rabius, are unsatisfactory. This is because of occupations, unions, difficulty of administering, worker resistance, and having to hire two employees for one job (Tr. 272-273).

The purpose of the MSHA survey of the Degerstrom equipment was to develop a feasibility study for the purpose of establishing noise controls for the following job classifications: Terex dozer operator, primary crusher operator, and the plant oiler (P 11).

The MSHA officials measured and graphed the noise level with their equipment. Extensive measurements were taken at the Degerstrom site (P 11).

The study consists of measurements taken, charts, tables, graphs, and tape segments (Tr. 240-242). The noise exposures at various work areas were calculated and programmed into a computer. A statistical summary was also prepared (Tr. 242-247, P11).

Concerning the dozer operator: the recording microphone was placed in various locations on the dozer and the noise level was measured while the dozer was operating at high idle and tramming (P 11 at 3).

A calculation, called a Leq, is the equivalent noise level in dBA (P 11 at 3). Octave band spectra from the graphs form the basis to determine the major sources of noise (P 11 at 3).

The dominate noise source of the bulldozer, in addition to the fan behind the operator, is caused by the squealing brakes of the bulldozer (P11 at 3). As a result of its study MSHA reached certain conclusions as to the job classifications. These conclusions follow.

Terex Dozer Operator

An effective approach to noise control begins by isolating and controlling the primary noise sources before progressing on to the lesser sources. Figures 8 through 13 [in P11] show the spectral signatures of various components of the dozer during tram and high idle testing. As discussed earlier, there appear to be two major noise sources - the engine cooling fan and the motor. The following steps, followed in the given order, will provide significant reduction to the operator.

1) Cooling fan - a shroud should be constructed for the cooling fan located behind the operator. The shroud must accomplish two things: it must be of sufficient size and mass (i.e. 1/4 inch steel plate) to deflect the fan noise away from the operator and it must be open enough to allow for adequate engine cooling.

2) Tracks - The operator view of the tracks should be blocked [1]/ by the use of small steel panels placed at the supports. The exact location, dimensions and configuration of the barrier panels must be determined by trial and error analysis. Noise reduction efficiency, fastening, and operator view are all of critical importance. The treatment of the crawler tracks recommended by MSHA has not been done elsewhere (Tr. 270).

3) Muffler exhaust stack - Figure 4d [in P11] shows the operator's view of the exhaust. This stack should be extended approximately 18 inches so that the opening will be well above the level of the canopy. Thus, the canopy will act as a barrier against this source.

1/ See discussion of this portion of the report, infra, page 22.

4) Transmission/Engine - Considerable noise is radiating from the floor and firewall, necessitating the need for a great deal of mass in these areas for control. Conveyor belting, containing both mass and flexibility should be used to cover as much of the floor as possible and continued up the firewall under the instrument panel. A layer of barrier-foam material should then be placed over the belting and then the entire treatment covered with a skid-abrasion resistant pad.

In addition, the engine side of the firewall should be treated with a fiberglass-barrier material with a heat resistant facing. This will reduce the engine/mechanical noise coming through the instrument panel and firewall.

At this point in its report MSHA lists 12 manufacturers of barrier type equipment.

The MSHA report relating to the dozer continues to the effect that the remaining four recommendations constitute treating the somewhat lesser noise sources. However, their importance should not be neglected since, if untreated, these "minor" sources can short-circuit the cure. The recommendations follow:

5) Hang a section of belting from the left side of the engine cowling near the firewall. This will refract the mechanical engine noise in a wider pattern, away from the operator.

6) Lift up the operator chair and cover the transmission with belting or any other material with significant mass. A foam will not work.

7) Cover all holes around gear levers with rubber boots or stuff them with belting.

8) Line the inside of the canopy with a foam material to prevent reverberation. Since the canopy is also acting as a shield for the exhaust noise, a barrier material might provide even better results. Manufacturers of these materials are listed.

These steps should provide significant reduction. When they are complete, additional work may be needed for the air intake and the Jimmy Blower. However, at this stage, these sources were masked by the others.
(Exhibit P11 at 6-8).

Primary Crusher Operator

Concerning the primary crusher operator (feederman): after the citations were issued and before the feasibility study in June 1980 Degerstrom constructed a booth for the operator. Noise levels were

measured in the booth under varying perimeters (P 11 at 1, 2). A partial history of the operator's time inside and outside the booth was calculated. The operator's duties divide his activities and he is in and out of the booth at various times. In a three hour and 43 minute period the operator was exposed to a 89.9% noise exposure. This translates to an eight hour exposure of 193% (P 11 at 2).

Witness High indicated that the noise exposure to the primary crusher operator can be reduced by building a control booth for the operator (Tr. 97, 98). Control booths are commercially available and 75 percent of all crushing operations use such booths (Tr. 99). A 4 x 4 booth costs $2,745. A plywood enclosure costs between $500 and $1,200, up to $2,000 (Tr. 100, 101). The use of a booth will reduce the operator's exposure 20 dBA to within permissible limits (Tr. 100, 101).

Concerning the crusher itself: MSHA suggests that the feed hoppers of the discharge chute, the catch basins, and screens be lined with rubber. Expensive impact resistant rubber is commercially available but an operator could use old conveyor beltings (Tr. 101-103).

In MSHA's view hearing protection is not an administrative or engineering control because it is only a temporary remedy (Tr. 105, 106). Administrative controls would include staggering work shifts and rotating workers out of high exposure areas (Tr. 98).

Witness High has, in his experience, seen the noise exposure on some crushers reduced from 139 dBA to 90 dBA (Tr. 125-126).

MSHA's feasibility study at the Degerstrom site caused the Secretary to reach certain conclusions concerning the crusher operator. These were as follows:

An immobile steel panel with a glass viewing window placed between the jaw crusher and operator will offer a more constant noise reduction compared to a door that is constantly opening and closing. Such a panel already exists in the booth opposite the existing access door and it would be in the proper position if the booth were relocated to the opposite side of the crusher.

The following recommendations will further reduce the noise exposure to the operator:

Relocate the booth from its present location to the opposite side of the crusher.

Rehinge front door so when it is open, it still blocks out the crusher noise.

While the access door can be left open for ventilation, a safer design would be to seal it shut and use an adjustable window.

Cover all holes and leaks with belting; cover the floor with belting and a skid resistant cover.

Plant Oiler

The plant oiler is the most difficult of all to protect (Tr. 122-123). A history of the operator's time in some 15 tasks was calculated. The oiler received an exposure of 29.8% from 12:30 p.m. to 2:30 p.m. This translates to an eight hour exposure of 119 percent which is in compliance (P11 at 4). The MSHA report indicates that "a better candidate for [noise] control would be while the oiler is at CP2 (this is one of his tasks where he spent eighteen minutes and the additional task is while he is relieving the primary crusher operator) (P11 at 4). Between 6:15 a.m. and 2:30 p.m. the oiler's time and exposure was calculated at 78 different locations (P11 at Table 4).

Concerning the plant oiler the Secretary reached the following conclusions:

This worker will automatically get noise reductions by suggested modifications to the crusher booth where he spends about 30 minutes each day in levels of 92-98 dBA with the door opened. In addition, since he was already in compliance, at least on the day of the feasibility study, any recommendations might be academic. Finally, since the plant does not have the same orientation each time, severe constraints are put on any recommendations. Nonetheless, the following steps will reduce the noise exposure to the oiler: (P11).

Require skirts on all the belts. Skirts keep material from falling off of the belt and thereby reduce the time the oiler spends in close proximity to excessive noise (Tr. 266, 267).

Locate or orientate the M-30 trailer or any similar vehicle away from the plant so that the levels at the entrance way are well below 90 dBA (P11).

Place sound screens made of belting or plywood in front of the CP-2 generator or any similar generator (on the day of the study at this particular plant the oiler received 18 percentage points from this source) (P11).

Place one or two sound screens made of belting or plywood in strategic locations to make a quiet area for conversations with the foreman (P11).

The summary in MSHA's report concludes as follows:

A study was conducted to determine feasible noise controls for the crusher operator, plant oiler, and dozer operator at a Degerstrom portable crushing operation. Controls exist which will reduce the noise exposure of these three operations. If desired, DTSC [Denver Technical Support Center] can work with the company in the fabrication, installation and evaluation of these controls.

Respondent's Evidence

Eugene Friend, Degerstrom's safety director since 1972, is a person experienced in safety (Tr. 138-140). The company crushes round river rock varying in size from 3/4 of an inch to 10 inches in diameter (Tr. 298). In the basalt pit the diameters of the rocks vary from 2 1/2 inches to 18 inches (Tr. 298). The greatest noise intensity is generated by large round rocks from river beds and by basalt rocks (Tr. 299).

Friend took noise level readings on the Terex C6 and Caterpillar D-8. He found the equipment was not within permissible limits (Tr. 140, 141). Degerstrom educates its workers and insists they wear personal hearing protection such as ear plugs or ear muffs (Tr. 141, 142).

Since 1972 Degerstrom has observed and measured the sound levels of its various pieces of equipment, and educated its employees (R1, R2).

Friend has inquired about sound suppression devices (without much success from industry or MSHA) and since 1979 Degerstrom has, at varying costs, sound proofed some 36 pieces of equipment (Tr. 145, 149-150, 160, 182-183, R2). The total cost of such sound proofing was $21,034 (R2). The costs of Degerstrom's efforts averaged $600 to $800 per dozer (Tr. 160). After installing its engineering controls over the years Degerstrom still continues to monitor noise readings in the 90's on the dBA scale (Tr. 166).

Concerning the hearing protection devices themselves: Friend relies on the manufacturer's information to determine their effectiveness (Tr. 147). But he didn't take noise readings under the ear muffs. His knowledge of the effectiveness of this equipment is limited to the manufacturer's claims (Tr. 175, 176).

Friend, in his search for compliance, also contacted the local Terex and Caterpillar dealers since he felt there was nothing available on an engineering basis except hearing protection (Tr. 145, 146).

Friend was advised by Terex and Caterpillar dealers that the cost of a full cab on a new Caterpillar is $10,000 to $14,000 (Tr. 151-152).

After receiving the citations in this case and without adding on cabs, Degerstrom installed new mufflers. These presented back pressure problems and reduced the effectiveness of the machines. Further, the company lined the roll over protective cabs with a one inch sound foam and installed a teflon-lead impregnated mat (Tr. 153, 154, 186, 187). They also built a windshield screen. But they felt the screen was a greater hazard since it reduced visibility (Tr. 154-155). Degerstrom was able to reduce the noise level three decibels on the Terex (106 reduced to 102) and four on the Caterpillar (104 but not below 100). But they are still not within permissible limits (Tr. 156, 157, 177-178).

Witness Friend agrees that extending the muffler stack will lower the decibel rating and Degerstrom has made those changes (Tr. 286). The installation of belting over the transmission can cause heat problems. The equipment, when at maximum output, approaches its heat capacity (Tr. 287, 288). Before the citations were issued Degerstrom installed sound mats on the tractor floor boards and lining on the inside of the canopy. This was fairly successful [in reducing the noise] (Tr. 287-289).

Degerstrom does not know how to avoid the citations. In Friend's opinion the personal protective equipment such as ear plugs and ear muffs provide adequate protection (Tr. 166-168).

Friend indicates that the proposed partial barrier and fenders for the dozers obstructed the operator's vision. They had experimented with a partial barrier (Tr. 168, 169, 284). Friend's operators also object to a fully enclosed cab because it would obstruct the operator's vision and constitute a safety hazard (Tr. 169-171). Before the MSHA study Degerstrom put a deflector on the top of the Terex radiator. This cost $70 and only lowered the noise level one dBA (Tr. 282, 284).

Concerning the noise from the primary crusher: Degerstrom built a small booth for the feederman. They also bought the best muffler available and generally tried to quiet the plant (Tr. 157, 279). The crusher operator's activities require him to be in and out of the booth. His outside activities depend on how the rock is being crushed (Tr. 158). Degerstrom found that its booth did not materially reduce the noise levels (Tr. 159). The booth, after it was rebuilt, lowered the noise level 2 dBA (Tr. 279). The company is unable to predict how much time the crusher operator will spend outside of the booth (Tr. 280).

Degerstrom considers it more expensive to put engineering controls on its portable equipment as compared to permanent equipment. If the equipment is portable the company must consider how it can be moved and whether it remains practical to move it on the highway. (Tr. 164, 165, 176). Each engineering control gives rise to other problems (Tr. 165). There are also problems involved in moving the booth for the feederman (Tr. 176-178).

The company previously requested but did not receive any technical assistance from MSHA (Tr. 165). Degerstrom does not know what is technologically or economically feasible to abate the citations (Tr. 167). The company did not seek technical assistance "from the outside" (Tr. 172). But there is better technical assistance available now since this law went into effect (Tr. 173).

The company does not have the manpower to rotate its workers. In addition, while it has not, the union might object (Tr. 162, 174). Before the issuance of the citations no administrative controls were used to reduce noise levels (Tr. 174). Degerstrom considers hearing protection to be an administrative control (Tr. 174-175). Degerstrom now uses a lighter ear muff with greater attentuation (Tr. 189).

Workers wear personal protective equipment at all times (Tr. 191). George Berglund and H.J. Breredon, distributors of Caterpillar and Terex, were contacted by Degerstrom about problems with the equipment (Tr. 194, 195, 205). The Caterpillar noise abatement solution requires isolation of the operator and then suppression of the noise from his environment (Tr. 207). The Caterpillar controls must be redesigned (Tr. 208-209). This involves enormous problems. The cost would be approximate $25,000. At the time of the hearing a D-8 (Caterpillar) cost just under $200,000 (Tr. 208, 209). The price for a sound suppression canopy is $10,850 (Tr. 209-210).

The Caterpillar representative has no knowledge of MSHA's claim that compliance can be achieved for $700 to 1400. The best information from Caterpillar, and all such crawler tractor manufacturers, confirms that old machines cannot be brought into compliance (Tr. 210, 211). Bower Machinery, witness Berglund's Company, would not attempt to bring a 5 year or older D-8 into compliance (Tr. 212). Nor would Caterpillar (Tr. 212). Caterpillar does not install partial barriers on old machines (Tr. 213). But Caterpillar will guarantee a 90 decibel rating on a new machine (Tr. 213).

In the opinion of witness Breredon, (the branch manager of Evans Eugene Equipment Company and the Terex distributor) it would cost $15,000 to $20,000 to change the equipment. But neither he nor the Terex engineers could guarantee that the dozer would comply with MSHA standards (Tr. 197, 198). Breredon has not installed cabs on any old tractors (Tr. 199). And they have never brought a track type dozer into compliance (Tr. 295).

Terex, a division of General Motors, is making extensive changes to reduce the noise levels on its new dozers (Tr. 199, 200). A new dozer costs $179,000 and incorporating noise suppression devices would add an additional 15 to 20 percent to that cost (Tr. 200).

At the time of the hearing the trade in value on a C-6 would be approximately $15,000 to $20,000 (Tr. 202-203). According to Breredon, even though someone requested it, a C6 it could not be brought into compliance. He didn't know to what extent the noise exposure could be reduced (Tr. 200, 201).

In addition to the testimony of its witnesses, Degerstrom also submitted a written rebuttal to MSHA's feasibility study. Inasmuch as MSHA's report was in the main incorporated here (P11), I deem it necessary to restate the Degerstrom written report (R3). Its rebuttal basically provides as follows:

Degerstrom understood that the request for an extension of time on the hearing was for a feasibility study which would in fact establish the amount of monies necessary to guarantee the noise levels to meet the regulatory requirements. As far as the survey is concerned Degerstrom can see very little has been done toward that end.

Dozer Operator

The cooling fan shroud recommended in the MSHA report was installed some time before this survey on one of the company's other machines (Terex C-6 dozer) with a design they felt would help. However it only lowered the noise level at the operators ear level 1 dBA. Not significant in the company's estimation.

Blocking the view of the tracks of the machine for noise suppression met with vigorous objections from the operators. And the company feels they are adding a much more serious hazard to the safe operation of the machine than we are accomplishing in noise suppression.

The extension of the exhaust muffler stack was installed on almost all the dozers for more than a year before the survey. This particular machine just happened not to have a long extension at the time. The company concurs that a proper exhaust stack lowers the noise approximately 2 to 3 dBA at the operator's station.

The procedures for treating the transmission/engine outlined by MSHA (in paragraph 4) were accomplished on the company machines sometime before this survey was made. Degerstrom found this procedure lowered noise levels about 2 dBA on a typical machine.

The company contemplated noise barrier of fiberglass with heat resistant facing on its dozers earlier, but felt the small area of the engine fire-wall would allow only a very insignificant noise reductions. Less than 1 dBA.

The suggestion to hang belting from the left side of the engine cowling would amount to very insignificant changes in noise level, less than 1 dBA. Covering the transmission with any belting or other material cannot be used on this dozer. This is a critical heat problem with automatic transmissions, and this suggestion would add to that problem so it is unacceptable.

The closing of as many holes on the deck as possible would help with noise suppression, but in this case the company feels it would amount to less than 1/10 of a decibel. This application would be very insignificant.

The suggestion that the canopy be lined with foam has been applied to all company dozers, and had some effect on noise suppression. Degerstrom concurs that it is probably the most effective control for ROPS cabs on dozers. That is why all Degerstrom dozers have such foam.

As far as a barrier material suggestion is concerned, the company experimented with it. Sound foam was much less effective than foam.
(Exhibit R3)

Primary Crusher Operator

Concerning this job classification Degerstrom's rebuttal of the MSHA report states:

Relocation of the booth as suggested would involve considerable expense. Degerstrom estimates the cost at approximately $600 in time, materials, and labor. They have no way of knowing what the noise levels will be at that station without doing the work. Degerstrom feels that it would not reduce it more than 3 to 4 dBA (Exhibit R3).

Rehinging of the front door has already been done along with window modifications and with the booth in its present position. The company reduced the noise level approximately 2 dBA with the door open with these adjustments (R3).

Regarding the booth changes: Degerstrom does not understand how the design would be safer by sealing the door shut and using an adjustable window as stated by MSHA (R3).

Present booth design has special sound proof matting as a floor cover with holes in the floor sealed. The company made this design in its original construction and were only waiting for suppliers to furnish the matting at the time of this survey.
(Exhibit R3)

Plant Oiler

Concerning this job classification:

Degerstrom's witness Friend states that the dosage to the plant oiler depends on where he wanders in his duties (Tr. 289). On the day of the feasibility study he was within the permissible limits (Tr. 289). Witness Friend states that MSHA's report suggests skirts for the conveyor. The company has skirts at the belt intersections (Tr. 290).

Degerstrom's written rebuttal also addresses the plant oil job classification. It states:

To locate the trailers away from the plant to any degree will be difficult in many of our crusher settings.

To place sound screens of belting or plywood around the generator adds to the heat problem of these units. The company does not feel this is a good method to pursue (R3).

The practicability of building conversation areas in portable crushing sites is difficult because of space limitations (R3).

Discussion

In noise cases the Secretary contends he meets his burden of proof by establishing that the miners were exposed to excessive noise and by then offering general evidence as to the type of administrative or engineering controls the operator might use (Brief at 5, 6). The Secretary contends that the burden then shifts to an operator to establish that compliance is not feasible under the conditions unique to the operator's mine (Brief at 7).

The Secretary specifically urges the Commission to reject any test of feasibility involving a weighing of costs and benefits (Brief at 8).

On the other hand, and directly contrary to the Secretary's position, Degerstrom asserts the Secretary must show the cost of controls and he must weigh those costs against the amount of noise reduction and health benefits (Reply brief at 2). In support of its position Degerstrom cites RMI Company v. Secretary of Labor, 594 F. 2d 566 (6th Cir 1979). A review of RMI confirms this ruling. However, since RMI the Supreme Court inter-

preted the word "feasible" in Section 6(b)(5) [2]/ of the OSH Act as meaning "capable of being done" or "achievable." The Court held that Congress intended employee health to outweigh "all other considerations save those making the attainment of this 'benefit unachievable." American Textile Manufacturers Institute, Inc. v. Donovan 101 S. Ct 2478, 2490 (1981). In (ATMI) the Court specifically held that "feasible" does not require, and indeed precludes, a weighing of costs and benefit, 101 S. Ct. at 2491.

But the law on this point continues in a state of flux. Since ATMI United States Court of Appeals for the Ninth Circuit affirmed an Occupational Safety and Health Review Commission (OSHRC) decision that applied the cost-benefit test developed originally by OSHRC in its Continental Can doctrine. Donovan v. Castle & Cooke Foods, a Div. of Castle & Cooke, Inc., 692 F. 2d 641, (9th Cir., Nov 19, 1982). The Ninth Circuit considered in Supreme Court's interpretation of the term "feasible" to be inapplicable to the noise standard.

The Ninth Circuit held ATMI inapplicable, in its view, because the Supreme Court was deciding a case under the toxic materials section and the

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2/ This portion of the Occupational Safety and Health Act, 29 U.S.C. 655(b)(5), reads as follows:

(5) The Secretary, in promulgating standards dealing with toxic materials or harmful physical agents under this subsection, shall set the standard which most adequately assures, to the extent feasible, on the basis of the best available evidence, that no employee will suffer material impairment of health or functional capacity even if such employee has regular exposure to the hazard dealt with by such standard for the period of his working life. Development of standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the employee, other considerations shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

authority for the noise standard arose under Section 6(a) 3/ of the Occupational Safety and Health Act, 692 F. 2d at 657.

But to continue: The Occupational Safety and Health Review Commission, whose case had been affirmed by the Ninth Circuit subsequently ruled that the term "feasible" in the statute was identical in meaning to its twin in the noise standard. The OSHRC held that when Congress authorized the Secretary to adopt established federal standards and national concensus standards as occupational safety and health standards, it understood the Walsh-Healey standards would be the primary source of established federal standards for covered workplace hazards.

OSHRC, in its later decision, indicated that several of these standards, like the noise standard, regulated exposure to "toxic materials" and "harmful physical agents" and contained feasibility requirements. Further, at the same time that Congress authorized the adoption of section 6(a) standards, it authorized the promulgation of standards dealing with toxic materials or harmful physical agents under section 6(b)(5). This section contains a feasibility requirement. The OSHRC further ruled there was no indication that Congress intended the feasibility requirement of existing standards (that the Secretary was authorized to implement immediately) to be measured by a different criterion than feasibility under section 6(b)(5).

In sum, the OSHRC declined to acquiesce in the Ninth Circuit's divergent interpretation of the term "feasible." Rather, in a two to one decision, they ruled the ATMI interpretation to be applicable to the OSHA noise regulation. Sun Ship, Inc., Docket No. 16118 December 17, 1982. In overturning its cost benefit doctrine OSHRC abandoned its precedent established in 1976 in cases arising with the advent of Continental Can Co., 76 OSHRC 109/A2, 4 BNA OSHC 1541, 1976-77 CCH OSHD ¶ 21,009 (No. 3973, 1976) appeal withdrawn, No. 76-3229 (9th Cir. April 26, 1977).

A sharp parallel exists in this case with the reasoning of the majority in Sun Ship, Inc.

In the 1977 Mine Act the Secretary's statutory authority concerning the adoption of standards lies in Section 101 of the Mine Safety Act. The pertinent portions of the section provide as follows:

3/ The cited section, now codified at 29 U.S.C. 655(a), reads as follows:

(a) Without regard to chapter 5 of title 5, United States Code, or to the other subsections of this section, the Secretary shall, as soon as practicable during the period beginning with the effective date of this Act and ending two years after such date, by rule promulgate as an occupational safety or health standard any national consensus standard, and any established Federal standard, unless he determines that the promulgation of such a standard would not result in improved safety or health for specifically designated employees. In the event of conflict among any such standards, the Secretary shall promulgate the standard which assures the greatest protection of the safety or health of the affected employees.

> Sec. 101. (a) The secretary shall by rule in accordance with procedures set forth in this section and in accordance with section 553 of title 5, United States Code (without regard to any reference in such section to sections 556 and 557 of such title), develop, promulgate, and revise as may be appropriate, improved mandatory health or safety standards for the protection of life and prevention of injuries in coal or other mines.
>
> (6)(A) The Secretary, in promulgating mandatory standards dealing with toxic materials or harmful physical agents under this subsection, shall set standards which most adequately assure on the basis of the best available evidence that no miner will suffer material impairment of health or functional capacity even if such miner has regular exposure to the hazards dealt with by such standard for the period of his working life. Development of mandatory standards under this subsection shall be based upon research, demonstrations, experiments, and such other information as may be appropriate. In addition to the attainment of the highest degree of health and safety protection for the miner, other consideration shall be the latest available scientific data in the field, the feasibility of the standards, and experience gained under this and other health and safety laws. Whenever practicable, the mandatory health or safety standard promulgated shall be expressed in terms of objective criteria and of the performance desired.

In addition, the 1977 Mine Act contemplates the continued enforcement of all of the then existing metal, and nonmetal and coal standards. Legislative History of the Federal Mine Safety and Health Act of 1977, 95th Congress, 2nd Session, at 374 (July 1978). The noise standard, 30 C.F.R. 56.5-50, originally appears on July 31, 1969 at 34 FR 12511.

After carefully reviewing the above cited statutes and cases I conclude that a weighing of costs and benefits is not required by the Secretary.

Concerning technoligic feasibility: no one seriously contends that the technology is unavailable to achieve compliance. Such ability is apparent on the facts relating to the Terex dozer, the primary crusher, and the plant oiler.

Concerning economic feasibility: MSHA's estimates of $700 to $1400 to bring the dozers into compliance conflicts with Degerstrom's estimate of $25,000 per machine. The person in the business of making the engineering changes and charging for that service, will, in my judgment, more closely estimate the actual costs involved. Further, I do not credit MSHA's evidence on this point because there was no foundational basis to cause me to conclude that MSHA's estimates are credible.

For these reasons I conclude that the cost of noise suppression on the Terex bulldozer will be approximately $25,000. However, in view of Degerstrom's substantial annual income, as stipulated, I infer that such an expenditure does not render the costs economically infeasible.

I appreciate the difficulty faced by Degerstrom and the suppliers of its heavy equipment. As they state there are no doubt "enormous problems" with bringing a used vehicle into compliance. However, their knowledge and expertise should be enhanced by their recent efforts since at least one tractor supplier, Caterpillar, now "guarantees" less than 90 dBA on a new vehicle (Tr. 213).

This appears to be an appropriate place to address the remaining legal issues. Degerstrom attacks the Secretary's evidence as being legally insufficient. Degerstrom states that "at no time during the trial did the government indicate what engineering or administrative controls were feasible" (Brief at 1). "There was much general testimony concerning this but no definite answers" (Brief at 1).

True, there was no credible evidence of feasible administrative controls. However, the analysis and recommendations concerning engineering controls discussed in the evidence causes me to conclude that the use of such controls would cause a substantial reduction in the noise level. In this area MSHA's expertise clearly outweighs Degerstrom's contrary evidence. I compliment Degerstrom's efforts since 1972 in attempting to reduce the noise levels. But I credit MSHA's evidence that further substantial reductions can be made.

Degerstrom attacks MSHA's feasibility study as set forth in the testimony of Degerstrom's witnesses and in Exhibit R3. This presents a basic credibility confrontation. On this issue I credit MSHA's evidence. As a foundational matter MSHA's witnesses clearly outweigh Degerstrom's witnesses in expertise and in experience concerning engineering controls. On the merits MSHA's evidence is more persuasive.

Degerstrom asserts its tractors cannot be made to comply without the expenditure of approximately $25,000 and the equipment suppliers could not guarantee that even with that expenditure the machines would comply (Brief at 2-3). We have previously discussed the dollar costs. Concerning the second feature the Supreme Court indicated the Congressional mandate of feasible means "achievable." Substantial, if not full, compliance appears achievable on this record.

Degerstrom complains that this case was adjourned in order for MSHA to conduct at feasibility study and, after a substantial delay, when the cases were reconvened the Judge was advised there had been no such study (Brief at 3-4).

I disagree. The purpose of MSHA's visit was to "develop a feasibility study for engineering noise controls" for the plant oiler (313%), primary crusher operator (478%), dozer operator (1152%), Euclid C48 operator (710%), feederman of crusher (164%), and front end loader operator (390%). Degerstrom may disagree with the weight to be attached to the study but that feature is, I trust, encompassed in this decision. I do note that both parties to this case have fully cooperated with each other in an effort to resolve the excessive noise exposures. True, there was a substantial delay between the issuance of the citations and the later hearing involving the feasibility study. But Degerstrom was not prejudiced by this delay. All of its witnesses were available at the later hearing. In addition, abatement was accomplished here when Degerstrom removed its equipment from the work sites. (See orders terminating all noise citations) Degerstrom has apparently not incurred any expenses in complying with the MSHA's citations other than what Degerstrom undertook to do to reduce the noise levels.

Degerstrom declares MSHA must prove that its controls will make this equipment conform to the minimum noise levels. In other words, the Terex operator (WEST 79-362-M, Citation 346416) is exposed to 108 dBA. If the controls can only reduce the level to say, 99 dBA, the case should be dismissed since the permissible limit is 90 dBA (Tr. 64). A long line of OSHRC cases reject this view. In Continental Can Company, supra, OSHRC construed 29 C.F.R. 1910.95(b)(1). 4/ OSHRC stated that "the standard thus contemplates that there will be some situations where engineering or

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4/ The standard, 29 C.F.R. Sec. 1910.95(b)(1) provides:

When employees are subjected to sound exceeding those listed in Table G-16, feasible administrative or engineering controls shall be utilized. If such controls fail to reduce sound levels within the levels of Table G-16, personal protective equipment shall be provided and used to reduce sound levels within the levels of the table.

Table G-16 - Permissible Noise Exposure

Duration per day, hours	Sound level dBA slow response
8	90
6	92
4	95
3	97
2	100
1 1/2	102
1	105
1/2	110
1/4 or less	115

administrative controls are to be considered feasible even though they fail to reduce the noise below G-16 levels. 4 OSHC at 1545. Further, "for employees who do not receive the full benefit possible from personal ear protectors, any significant reduction in the ambient noise levels provides a benefit", 4 OSHC at 1545. OSHRC observed that in determining how great a reduction is significant, the logarithmic nature of the decibel scale must be considered.

In Continental Can OSHRC found a reduction of 3 dBA. This represented a halving of the air pressure. Accordingly, such a reduction was held to be clearly significant. 4 OSHC at 1545, footnote 13.

Degerstrom also argues that MSHA witness Rabius was extremely damaging to the government since he testified that very little could be done to reduce the noise levels and hearing protection had to be worn at all times and in any event (Brief at 4).

Degerstrom misconstrues the evidence. Witness Rabius (Tr. 232-277) testified administrative controls are not feasible since for various reasons since they are not generally satisfactory (Tr. 251). The only other possible reference to Degerstrom's assertion appears at pages 261-262 of the transcript. At that point witness Rabius was referring to the noise levels outside of the crusher booth. The witness was explaining: "I would recommend wearing hearing protection anytime there is a noise, as a personal thing, but where the levels are less than 90 [dBA], in the 80's, it would not be necessary to do so, but as soon as he leaves that protection [of the booth], then he would definitely have to wear hearing protection." (Tr. 262). For wearing hearing protection while operating the dozer see the transcript at 272.

Degerstrom states that its dozer operators will not operate machines that have vision barriers above the tracks (Brief at 5).

This point is uncontroverted. But the tracks are only one of the four main noise sources. The MSHA feasibility study treats the vision problem as follows:

> Tracks - The operator view of the tracks should 5/ be blocked by the use of small steel panels placed at the supports (Figure 16). The exact location, dimensions and configuration of the barrier panels must be determined by trial and error analysis. Noise reduction efficiency, fastening and operator view are all of critical importance.
>
> (P11 at 7).

5/ One would believe that the word "not" was omitted in the typing of MSHA's report. But the drawing in Figure 16 indicates the operator's view would be blocked. In any event the vision problem is not insurmountable.

Degerstrom's post trial brief further insists that its dozer operators will not operate any dozers placing the operators in a totally enclosed cab (Brief at 5).

This is simply not credible. Totally enclosed cabs with ROPS can be seen today on virtually any construction site.

Degerstrom claims that MSHA suggests that the site generator should be blanketed or veiled to prevent the dispersion of noise. It is true there is such a suggestion in the record and it related to a possible method of noise reduction for the plant oiler (Tr. 255, 256). It is only a suggestion. Since the plant oiler was found by MSHA to be in compliance I decline to rule on that feature of the case. In short, compliance was met without a blanket for the generator. There are sufficient issues in this case without delving into a problem that is purely hypothetical.

Degerstrom's brief further states that MSHA has no standards whatsoever to guide an operator as to what is, or is not, feasible (Brief at 5-6). I take Degerstrom's argument to be a vagueness attack on the regulation. Remedial legislation, when considering the purported vagueness of a standard, is based not in its face but rather in the light of its application to the facts of the case. PBR, Inc. v. Secretary of Labor, 643 F. 2d 890 897 (1st Cir 1981); McLean Trucking Company v. OSHRC 503 F. 2d 8, 10-11 (4th Cir 1974). It is axiomatic that defects in the constitutional sufficiency of a regulatory warning may be cured by authoritative judical or administrative interpretations which clarify obscurities or resolve ambiguities. Diebold, Inc. v. OSHRC 585 F. 2d at 1338 citing Rose v. Locke, 423 U.S. 48, 52 (1975), Parker v. Levy 417 U.S. 733, 752-54.

IN ATMI, supra, the Supreme Court determined that the term "feasible" has an ascertainable meaning based on the statute, 101 S. Ct. at 2490. The definition set forth by the Supreme Court is applicable to the regulation at issue. I reject Degerstrom's suggestion that the term is devoid of meaning.

The Secretary argues he needs only show exposure to noise in his cases and then the burden shifts to the operator to prove infeasibilty. I reject the Secretary's contention: Where the standard makes feasibility an element of the violation, the burden of proving that controls are feasible is on the Secretary. Carnation Co., v. Secretary of Labor, 641 F. 2d 801, 803 (9th Cir. 1981); Diversified Industries Division, Independent Stove Co., v. OSHRC, 618 F. 2d 30, 32 (8th Cir. 1980). As noted in Carnation Company, 641 F. 2d 803, realism and common sense should dictate how the Secretary may meet his burden of providing substantial evidence of feasibility.

Further when the Secretary seeks enforcement of a citation alleging a violation of the noise standard, he bears an initial burden of showing that technologically feasible engineering controls are available to the cited employer.

Although the Secretary will generally have access to information on the average development and installation cost of the proposed controls, he will not have knowledge of the specific economic impact implementation of the controls will have on the cited employer. Therefore, once the Secretary meets his initial burden, the burden must shift to the employer, who may raise the issue of economic feasibility particularily with the knowledge of the operator. Castle and Cooke Foods, supra, 692 F. 2d at 650.

For the above reasons I conclude that the citations in case WEST 79-362-M should be affirmed.

WEST 79-14-M

In this case the Secretary issued his citations numbered 350839 and 350840 under Section 104(a) of the Act. He alleges Degerstrom violated 30 C.F.R. 56.5-50 when its Caterpiller operator and feederman were exposed to excessive concentration of noise.

Petitioner's Evidence
Citation 350839

On November 22, 1978 MSHA's representative, Richard Perron, inspected Degerstrom's C48 Caterpillar [6]/ tractor at its Theater Pit (Tr. 20, 21, 29). Although he extended an invitation neither Degerstrom management nor the miner representative accompanied him on the inspection (Tr. 21-22). There were seven employees on the site (Tr. 30).

Perron put a dosimeter on the operator of the Caterpillar. At the time the Caterpillar was pushing material into the jaw crusher. No administrative controls were being used to reduce the noise level of the Caterpillar, although the operator was using ear plugs (Tr. 23). Inspector Perron issues a citation if an operator is over exposed (Tr. 43, 44). Feasibility and costs are not witness Perron's job. But he is aware if some general controls to reduce noise (Tr. 50, 51).

The dosimeter collects and stores noise levels. At the end of an eight hour shift a readout device calculates the noise exposure (Tr. 23-25).

6/ The citation and the testimony refers to the "C 48 Cat and D8" (Tr. 21-22, 31). But the feasibility study refers to this equipment as the "Euclid C-48" (P11 at 1). I believe Caterpillar and Euclid are separate manufacturers. In any event it does not have to be determined whether the vehicle was a Caterpillar or a Euclid because MSHA did not present any feasibility evidence as to this particular unit.

In this work environment the noise exposure was 710 percent of the permissible limit. This translates to 104 dBA (Tr. 26). The allowable limit, in accordance with 30 C.F.R. 56.5-50, is 90 dBA for eight hours (Tr. 26).

The inspector's dosimeter met specifications and it had been calibrated at the MSHA office (Tr. 26).

Citation 350840

The inspector observed an employee operating a crusher (Tr. 27, 251). A dosimeter was placed on the operator who was standing at the top of the primary rock crusher about seven feet from the noise source (Tr. 27-28, 48). In an eight hour period the dosimeter indicated the operator was exposed to noise at 164 percent of the permissible rate. This translates to 93 dBA (Tr. 27-28).

Mr. Gallagher, management representative was aware of the over exposure to noise. Degerstrom had made no effort to reduce the noise. The inspector gave the company one month to abate (Tr. 29, 30).

The workers were wearing some type of personal protection (Tr. 32-33). Inspector Perron didn't know if it is possible or feasible to bring the machine into compliance and he didn't feel qualified to address the areas of engineering controls concerning technological and economic feasibility (Tr. 35, 36). However, he didn't observe any administrative or engineering controls being used (Tr. 55).

Various contractors, including Degerstrom, crush rock at this pit for their individual use in highway construction work (Tr. 52, 53).

Evidence from MSHA Feasibility Study

The Euclid C-48 operator and the feederman 7/ of the crusher could not be analyzed in June 1980 because of operational reasons (P11 at 1). MSHA's witness Rabius indicated the feederman and loader operator were either not present at the time of the feasibility study or the job descriptions had been changed (Tr. 247).

7/ There is evidence in the cases concerning the reduction of the feederman's noise exposure but in view of MSHA's written report I consider that such evidence refers only to the primary crusher operator (also occasionally called a feederman). That employee was protected by the construction of a booth. After Degerstrom placed the booth MSHA recommended changes in its position to further reduce the noise (Tr. 253-255, P11 at Figure 15).

Respondent's Evidence

In 1979 Degerstrom spent $696 which consisted of sixteen hours labor and $296 of material in an effort to reduce the noise level of the C-48 dozer (R2 at 1).

Respondent's additional evidence generally relevent and material to these citations is discussed, supra, in Case No. WEST 79-362.

Discussion

The Secretary bears the burden of establishing technogolical and economic feasibility. No such evidence was offered. Accordingly, the citations and proposed penalties should be vacated.

WEST 79-331

In this case the Secretary issued his citation numbered 346490 under Section 104(a) of the Act. He alleges that Degerstrom violated 30 C.F.R. 56.5-50(b) in that the noise level around the operator of the front end loader was 390 percent, [100 dBA], of the permissible limit.

At the initial hearing there was evidence concerning this violation (Tr. 227-229). At the later hearing, after the feasibility study by MSHA, Degerstrom advised the Judge that Fischer (MSHA) had tested this equipment. The front end loader had been brought into compliance. Accordingly, Degerstrom was withdrawing its contest to the citation and the proposed civil penalty (Tr. 229, 230).

According to witness Friend compliance was attained on the front end loader by installing a new muffler and directing it away from the operator. Further, sound foam was installed in the interior of the cab (Tr. 291).

Pursuant to Commission Rule 29 C.F.R. 2700.11 the motion was granted and it is formalized in this decision.

WEST 79-363-M

In this case the Secretary issued his citations numbered 349040 and 349061 under Section 104(a) of the Act. He alleges that Degerstrom on two instances violated 30 C.F.R. 56.4-24(d). The section cited, Title 30 Code of Federal Regulations, Section 56.4-24(d) provides as follows:

> 56.4-24 Mandatory. Fire extinguishers and fire suppression devices shall be:
>
> (d) Inspected, tested, and maintained at regular intervals according to the manufacturer's recommendations.

Petitioner's Evidence

Theodore P. Herrara, an MSHA safety inspector experienced in mining, inspected the Degerstrom site (Tr. 10-13). Management and miner's representatives declined to accompany him (Tr. 13, 14).

The ABC ANSUL fire extinguisher in the oil storage room had not been checked periodically. The manufacturer recommends it be checked twice a year. The tag on the extinguisher indicated it was last checked in September, 1976 (Tr. 15, 16).

In the main control room the tag indicated the wall hanging fire extinguisher was last inspected in February, 1977 (Tr. 16). The manufacturer suggests bi-annual inspections (Tr. 16). There were no other extinguishers in these rooms (Tr. 17).

Inspector Herrara talked to Sanford (foreman) and Grimm about fire extinguishers (Tr. 13, 17). They said they looked good to them. The gauges confirmed that fact (Tr. 17). Herrara didn't attempt to contact the Degerstrom safety engineer (Tr. 19).

The inspector terminated the citation when Degerstrom complied (Tr. 18).

Discussion

The foregoing uncontroverted evidence establishes a prima facie case for the violation of the regulation.

Degerstrom's post trial brief does not state any position as to these citations. They should be affirmed.

Civil Penalties

In view of the stipulation and in considering the statutory criteria for assessing civil penalties, 30 U.S.C. 820(i), I deem that the penalties in WEST 79-362-M, WEST 79-331-M, and WEST 79-363-M are appropriate. They should be affirmed.

The Solicitor and Degerstrom's counsel filed detailed briefs which have been most helpful in analyzing the record and in defining the issues. I have reviewed and considered these excellent briefs. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. WEST 79-362-M:
Citations 346416, 346417, and 346418 are affirmed and penalties respectively, of $34, $28, and $28 are assessed.

2. WEST 79-14-M:
Citations 350839 and 350840 and all proposed penalties are vacated.

3. WEST 79-331-M:
Citation 346490 is affirmed and a civil penalty of $28 is assessed.

4. WEST 79-363-M:
Ciations 349040 and 349061 are affirmed and civil penalties of $26 for such violations are assessed.

John J. Morris
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 6 1983

SECRETARY OF LABOR,	:	Civil Penalty Proceedings
MINE SAFETY AND HEALTH	:	
ADMINISTRATION (MSHA),	:	Docket No: CENT 82-86-M
Petitioner	:	A/O No: 29-00174-05030 H
	:	
	:	Docket No: CENT 82-90-M
v.	:	A/O No: 29-00174-05029
	:	
	:	Docket No: CENT 82-91-M
	:	A/O No: 29-00174-05031
AMAX CHEMICAL CORPORATION,	:	
Respondent	:	AMAX Mine and Mill

DECISION

Appearances: Eloise Vellucci, Esq., Office of the Solicitor, U.S. Department of Labor, 555 Griffin Square, Suite 501, Dallas, Texas 75202, for Petitioner;
Charles A. Feezer, Esq., P.O. Box 128, Carlsbad, New Mexico 88220, for Respondent

Before: Judge Moore

The above docket numbers were consolidated for trial in Carlsbad, New Mexico on January 19, 1983 and involved 9 alleged violations of the safety standards. The second alleged violation that the solicitor chose to present involves citation No: 518039. After the inspector had testified as to why he issued the citation counsel for respondent announced that as far as he could tell from his files he had not contested that particular citation. Reference to the answer that he filed showed that no mention had been made of the citation and as far as he knew it had either been paid or the company had intended to pay it. After an off-the-record consultation it was agreed that there was no dispute concerning this citation. The violation occurred and the respondent has either paid the citation or will pay it. At the conclusion of this decision I will order payment, but of course, if respondent has already paid the citation that will end the matter.

The next citation presented by the solicitor was numbered 518040. After the inspector had testified with respect to this citation the exact same sequence of events occurred as those involved in the previous citation. I will order payment of the assessment but again, if respondent has already paid the assessment the order will be of no effect.

Citation No: 0517732 involved a defect in the manhoist in that one of the guard rails had split creating a hazardous situation. After the witness had been examined and cross-examined counsel for the government agreed with respondent's counsel that the testimony did not establish a violation of the standard. I therefore vacated the citation and dismissed that portion of the case. This left 6 alleged violations to be considered.

Citation No: 518053 and Citation No: 518049 both involved allegations that the back (roof) was bad. In connection with the first citation mentioned above an imminent danger order was also issued. This was a potash mine and in potash mining there is no requirement that roof bolts or other roof supports be used unless there is some danger of a roof fall. Citation No: 518053 which was also an imminent danger order involved a travelway and there was admittedly bad top. Respondent had installed 175 roof bolts in the area and had installed cribs. The inspector noted that the cribs were not flush and tight against the back and his speculation was that green wood had been used and had shrunk. Respondent's witnesses were of the same opinion. I agree with respondent's witnesses that the fact that there was a gap between the top of the cribs and the top indicated that the cribs had shrunk away from the roof and that the roof had not moved. This indicates to me that the roof bolts were doing the job. It is a matter of one expert's opinion against another's and after hearing the testimony I can not conclude that the roof was improperly supported. I vacate citation No: 518053. With respect to citation No: 518049 it is again a matter of opinion. Two of respondent's experts went to the area that the inspector had described and found the area adequately bolted. The inspector came back the next day and issued a closure order (not involved in these proceedings) and respondents eventually rebolted the whole area. Only the citation is before me for consideration and after hearing the testimony of the inspector and respondent's experts I can not conclude that the government has sustained its burden of proof with respect to this violation. The inspector and witnesses for respondent may have been observing different areas. (Tr. 191-192). The citation says that the slab "was over the roadway west of No. 30 belt drive in the Ten East Section." The citation does not say how far west. If the witnesses were describing different areas, the confusion was caused by the wording of the citation. Also, the essence of the alleged violation was a failure of a supervisor to inspect (Tr. 30-31), and the condition was one that could develop rapidly. The citation is Vacated.

Citation No: 518060 involved a work platform thirty feet high with railings on three sides but no railing on the fourth where the ladder was. The inspector observed a workman climb up on the thirty foot high scaffold and noted that he had no safety belt or safety line attached. The individual who was on the scaffold at the time testified that he was not working on the scaffold but had merely gone up there to get a piece of cable and had immediately brought it down. The standard in question, 30 C.F.R. 57.15-5 requires that a safety line be used where there is a danger of falling. It could be interpreted as requiring the climber of a ladder to climb two steps, re-attach a safety line, climb another two steps, re-attach a safety line and so-on till he got to the top of the ladder. It could also be interpreted to require him when he got to the top of the ladder to attach his line to something on the scaffold and reach over and grab whatever he is going to bring down, un-attach the line and re-attach below and work his way down the ladder attaching the safety line every three or four feet. I do not think that is a reasonable

interpretation. I think the standard is designed to protect a man who is working on the platform paint spraying or sand blasting or doing something else, from forgetting where he is and falling off the platform. In this case that was not a reasonable thing to anticipate. The citation is vacated.

Citation No: 517738 alleges a violation of 30 C.F.R. 57.11-27 in that a "falling hazard" existed on the roof of an office which was enclosed within the maintenance building. The building within a building was 9 feet tall, had some boxes on top of it, plus a ladder that was either welded or bolted on and there was no evidence that any one had climbed the ladder and worked on top of the office building. It was not established that this was either an area requiring guards all around or safety belts and the citation is accordingly vacated.

Citation No: 517734 alleges that there was not a safe means of access to a working place because in order to get there a miner is required either to step up twenty inches or to walk up a ramp that is only fifteen inches wide and has no guardrail. The citation was abated by constructing a two-step ladder in the area of the twenty-inch step-up so that it was no longer necessary to either step up twenty inches, or walk on the fifteen-inch wide ramp to get to the working area. There was testimony about a rack holding pieces of steel in the vicinity of the fifteen-inch wide ramp. There was speculation and hearsay testimony as to how a miner would go about getting pieces of steel off the rack, but I have to assume that when a MSHA inspector abates a citation he is stating that the alleged violation no longer exists. The steps that were used to abate the violation were on the left side of the ramp and steel rack and the unguarded fifteen-inch wide ramp is still right next to the rack holding the steel. Since any miner getting steel from the rack after the abatement would have to do exactly the same as a miner would have to do before the abatement, I do not see how the manner in which a miner gets the steel is pertinent to this violation. I do not consider it a failure to provide safe access to require a miner to either step up twenty inches or walk an unguarded ramp up to a height of twenty inches. The citation is vacated.

Citation No: 517720 alleges that there was an exposed pinch point in a return idler pulley underneath a conveyor belt where mobile equipment passes. At this mine the mobile equipment was a golf cart and it was common to take short cuts under the conveyor. A bracket in the area of the return idler was what created the pinch point and the pinch point was twentyfour inches above anyone riding in a golf cart. While it might be unlikely that someone would have their hands up going under the belt it is nevertheless the very type of hazard which the standard was designed to prevent. While I think an accident was unlikely, it was nevertheless possible and a serious injury could have resulted. There was good faith abatement. I find the proposed assessment to be a reasonable penalty and therefore assess $84 for this violation.

It is therefore ORDERED that respondent pay to MSHA, within 30 days, a civil penalty in the amount of $304.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 6 1983

MINERALS EXPLORATION COMPANY, Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	APPLICATION FOR REVIEW DOCKET NO. WEST 81-189-RM 107(a) Order of Withdrawal and Citation No. 577443 MINE: Sweetwater Uranium Project

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. MINERALS EXPLORATION COMPANY, Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-270-M A/C No. 48-01181-05030 H MINE: Sweetwater Uranium Project

Appearances:

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Before: John A. Carlson, Judge

DECISION

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), arose from an

inspection of applicant's (Minerals') surface uranium mine. On February 11, 1981, a mine inspector for the Secretary of Labor concluded his inspection of the C-1 pit of the Sweetwater Uranium Project with the issuance of a section 107(a) withdrawal order. He based this action upon his observation that areas of loose, unconsolidated and overhanging ground on one of the highwalls endangered miners working near the toe of the wall. The order charged a violation of a mandatory safety standard, 30 C.F.R. § 55.3-5, which provides:

> Men shall not work near or under dangerous banks. Overhanging banks shall be taken down immediately and other unsafe ground conditions shall be corrected promptly, or the areas shall be barricaded or posted.

Because a mandatory standard was involved, the inspector also issued a citation under section 104(a) of the Act, specifying that the violation was "significant and substantial."

PROCEDURAL HISTORY

This present proceeding commenced with Minerals' filing of an application for review of the imminent danger withdrawal order, which was first heard after an ordinary course of pleadings on April 15, 1981. At the conclusion of the two days allotted for trial, the Secretary had not completed his case in chief and the matter was continued to reconvene in June. The second segment of the hearing ultimately began on June 29, 1981, but only after some difficulties concerning whether officers of the Local Union of Progressive Mine Workers of America, Local 1979 B, as miners' representative, would be allowed to assert party status at the reconvened hearing. The judge initiated a June 22, 1981, telephone conference call, with counsel for both original parties and an officer of the union participating, in which arguments on the matter of party status for the union were entertained. Certain remarks made by Minerals' counsel were viewed by the union representative and the Secretary's counsel as an unlawful attempt to discourage or interfere with the Union's right of participation.

The hearing did reconvene on June 29, 1981, as scheduled, with the express approval of the union, which withdrew its motion for party status (Tr. 346). Again, however, the hearing did not proceed to completion. This time it halted because of government allegations and testimony that Minerals had "falsified" a number of exhibits. Counsel for the operator professed surprise, and was granted time to investigate this charge before proceeding further with his defense. Consequently, on the afternoon of June 30, 1981, trial was continued indefinitely. Before it could be reconvened, the first in a series of longer delays began. At the commencement of the hearing on June 29, 1981, counsel for the Secretary had filed personally with this judge a letter-motion asking for institution of disciplinary proceedings against counsel for Minerals because of his alleged threats to the union representatives in the June 22 telephone call.

On July 13, 1981 I referred the matter to the Commission without recommendation. The Commission found that a disciplinary proceeding was warranted, and by order of July 23, 1981 referred the matter to Chief Administrative Law Judge Merlin. Minerals, through counsel retained for the disciplinary proceeding, secured from the Commission a ninety day stay of the original review proceeding upon the merits.

Judge Merlin, on August 10, 1981, issued his decision holding, in essence, that while counsel's remarks were ill advised, no unlawful intent was present and that no disciplinary action beyond a cautioning was warranted. 1/

This judge set a resumption of the hearing on the merits for November 2, 1981. In the meantime, a flurry of motion filings and responses ensued concerning various documents which have been subpoeaned by the government in connection with the charge of falsified exhibits. This phase of the case culminated in Minerals' filing of a sixty five page "Motion for Sanctions," asking for various types of relief based upon the Secretary's alleged misconduct in the case. Specifically, Minerals sought vacation of the 107(a) order, a declaratory order condemning actions of two mine inspectors, an order referring the conduct of the inspectors to the Inspector General of the Labor Department for disciplinary action, orders striking certain exhibits from the record and returning other documents to Minerals, an order reprimanding the Secretary's counsel for the manner in which they obtained personal diaries of certain of Minerals' employees, and the "consideration" of disciplinary action against the Secretary's counsel.

All of the original counsel withdrew during the pendency of the motion and were replaced by other counsel. On November 4, 1981, this judge recused himself from consideration of the motion upon notification by the movant that he might be called as a witness. Judge Jon D. Boltz heard evidence on the motion for four days commencing on November 9, 1981. Both parties filed extensive post-hearing briefs, and Judge Boltz took the matter under advisement. On April 7, 1982, he issued his written order on the motion for sanctions in which he denied all the requested sanctions.

On May 3, 1982, the Commission received Minerals' petition for discretionary review of Judge Boltz's determination. The Commission, by order issued May 11, 1982, denied discretionary review because the judge's determination was not "final" within the meaning of the Act. It therefore deemed the petition one for interlocutory review under Commission Rule 74, and stayed the proceedings on the merits. On May 25, 1982, it denied the petition for interlocutory review, dissolved the stay, and returned the files to this judge.

1/ See Disciplinary Proceeding (Minerals Exploration Company), Docket No. D 81-1, August 10, 1981.

Meanwhile, on October 1, 1981 Minerals had filed a letter reflecting that the alleged hazard had been abated, and that the Secretary had therefore terminated the withdrawal order on September 9, 1981. A copy of the termination order was attached. The Secretary was therefore free to propose a civil penalty, which was duly contested by Minerals. That proceeding, docketed as WEST 81-270-M, was assigned to this judge and consolidated on November 18, 1981 with the earlier application of review of the withdrawal order.

On July 7, 1982 Minerals moved that I issue a decision on the merits upon the present record. On September 15, 1982, the Secretary and Minerals filed a joint motion requesting that I decide the consolidated case without further hearing and without briefs.

Denominated a "Joint Motion for Decision on the Present Record," the motion is actually somewhat broader than that. It provides that diary entries made by certain Minerals' employees are to be considered as evidence, though never introduced at trial. (In the proceeding before Judge Boltz, Minerals had unsuccessfully sought to have these diaries suppressed on grounds that they had come into the Secretary's possession through unlawful means. Thus, while the parties agree that I may consider the contents of the diary entries, Minerals reserves its right to review its plea for supression before the Commission at the appropriate time.)

The joint motion also specifies that if a violation is found the penalty is to be determined on the basis of the record made in the proceeding to review the withdrawal order. That record is supplemented by stipulation in the motion as to several routine facts relating to penalty considerations.

Finally, the parties stipulate that the decision should be made "without reference to" the separate record made before Judge Boltz.[2/]

On October 6, 1982, I granted the parties' motion to render this decision on the present record. That record contains the Secretary's case in chief, but was terminated shortly after the commencement of the operator's case. By making the motion Minerals saw fit to waive the completion of its case. By joining with Minerals, the Secretary waived his right to cross examination of Minerals' only witness and his right to present any rebuttal.

The Secretary's allegation in his penalty proposal in Docket WEST 81-270-M that Minerals operations affect commence was not contravened by Minerals. The jurisdiction of the Commission is not in issue in these proceedings.

2/ It could scarcely be otherwise since I neither heard the testimony nor observed the demeanor of the witnesses in the sanctions hearing. To the extent, then, that evidence adduced at that hearing may have relevance to the validity of the withdrawal order or the issues in the penalty proceeding, it is simply not considered in this decision.

REVIEW AND DISCUSSION OF THE EVIDENCE

The undisputed evidence shows that the C-1 pit is one of three pits at Minerals' Sweetwater Uranium Project near Rawlins, Wyoming. Stripping began in 1978 and the mining of ore in 1980. The focus of this case is on the east highwall of the C-1 pit, which was mined to a planned slope of about 3/4 to 1 (3 feet horizontal to 4 feet vertical). (Tr. 455.) Mining proceeded with blasting and excavation by power shovels equipped with 17 yard buckets.

The mining plan in force at the time of the inspection provided for mining in a series of 40 foot vertical working heights or intervals on the highwalls (Tr. 284, 455).

When inspectors Merrill Wolford and Melville Jacobson viewed the C-1 pit on February 11, 1981, they observed a number of overhangs and an area of loose and unconsolidated ground clustered along the brow or lip of the 6540 foot bench. This bench (6540 feet above sea level) was at least 55 feet above the pit floor (Tr. 55). A shovel operator and an ore technician were working as close as 3 to 4 feet from the toe of the wall (Tr. 69, 85-86). Periodically, according to Wolford, four truck drivers were also close to the toe of the wall as their trucks were loaded. Had any of the overhanging or loose ground fallen from the lip of of bench, Wolford claimed, any of these six miners could have been killed or severely injured.

Consequently, Wolford issued his withdrawal order. In obedience to the order, Minerals "dangered off" the area of the pit floor below the overhangs by construction of a berm some 500 to 600 feet in length.

At the hearing Wolford and Jacobson's verbal descriptions of the condition of the bench lip were substantiated by other governmental officials. On February 17, 1981, the site was investigated by Gordon R. Lyda, a mining engineer with the Ground Support Division of the Denver Office of the Mine Safety and Health Administration. This witness described the soil structure in the overhangs and the loose soil area as sedimentary sandstones of varying degrees of cementation mixed with shales, siltstone and mudstone (Tr. 231, 242). The areas in question lacked "overall structural integrity," he testified, particularly since there were deep fractures in the surface of the 6540 foot bench immediately behind the overhangs. (Tr. 175, 184). From below, he saw "fractured, broken rock, [and] loose slabby material in the area of the overhangs" (Tr. 183-184).

Herman Fink, a Deputy State Mine Inspector for the State of Wyoming also viewed the wall on February 17, 1981. His observations agreed with those of Wolford and Lyda. He described "the whole highwall" as "full of loose rock" (Tr. 354-355).

The Secretary's witnesses also testified as to the cause of the overhangs: undermining of the crest of the 6540 bench. Lyda and Fink, in particular, asserted that shovel-teeth marks were plainly visible directly below the overhangs, an indication that the wall was improperly cut. The overhangs did not result, that is to say, from subsequent sloughage.

The brief testimony presented by Minerals' single witness, Lawrence G. Dykers, Project General Manager of the Sweetwater operation, did not directly rebut the testimony of the government witnesses. Mr. Dykers discussed a distinction between "irregularites" and "overhangs" in pit walls, explaining that irregularities are inevitable in the mining process. He did not go so far, however, as to deny that overhangs were present.

I conclude that the Secretary's evidence overwhelmingly establishes the existence of overhangs and an area of loose and unconsolidated ground. A host of color photographs, taken from various places and angles, confirm the words of the witnesses. The evidence also shows clearly that six miners were exposed at various times to the hazard presented by falling rock. The Secretary's evidence on this element of violation was never challenged.

To the extent that the operator attempted a defense in its abbreviated case, it was intended to center, I think, upon the existence of another safety bench below the 6540 bench. Had there been a broad bench below the 6540 bench, it would have served to catch much of any materials falling from the overhangs, and greatly reduced the possibility of injuries to miners working near the toe. Mr. Lyda testified that safety benches "are necessary to a proper mining operation," and conceded that they "would tend to reduce the hazard ... of people ... being struck by sliding or falling or airborne material" (Tr. 303-304). Even so, he was not certain that a bench would be adequate protection against the "major, significant overhangs" (Tr. 304).

As it turned out, however, there was simply no intervening bench - at least none of significance. Four government witnesses testified in detail about the lower bench. Their recitals were unanimous: a remnant of a lower bench was visible on the wall, but only a remnant. What width there was, was filled with sloughage. Thus, had overhanging or unconsolidated materials broken loose from the 6540 bench, nothing would have interrupted their fall to the pit floor (Tr. 25, 292-293, 356, 362, 539, 546).

This brings us to the allegedly "falsified" exhibits. Early in his testimony, mine project manager Dykers testified concerning a survey of the east wall of the C-1 pit which was initiated on February 13, 1981 (Tr. 461). A large plan view (overhead view) of the approximately 600 foot long section of the C-1 pit was then placed before the witness who indicated that it was a product of the survey. Dykers testified that survey points had been established at 19 points along the area of the face covered by the plan view. At these points the survey crew had physically measured the "most prominent and pronounced" irregularities on the face (Tr. 464-465). Shaded areas on the plan view, he said, represented slopes, and unshaded

areas flat surfaces, including safety benches (Tr. 467). This document, identified as exhibit A-2, was then offered and counsel for the Secretary was permitted voir dire.

After a few questions on voir dire, government counsel then suggested upon the record that the drawing was inadmissible because it was "falsified." Without objection from counsel for Minerals, counsel for the Secretary then read into the record a statement from one Brian K. Baird, the draftsman who had prepared the plan view. Baird's statement alleged that the original plan view and many of the original 19 cross sectional drawings had been altered before the hearing. The statement claimed that the original drawings had accurately reflected the survey notes and actual measurements.

Counsel for Minerals professed no knowledge of any alteration, agreed that the matter had to be resolved, and agreed to the issuance of subpoenas to government counsel to obtain the testimony of the appropriate company employees (Tr. 476-480). The hearing continued no further on June 29.

Testimony resumed the following afternoon with Brian K. Baird on the stand as the government's witness by agreement of the parties (Tr. 43). Baird confirmed that he was the draftsman who prepared the original plan view from the survey notes. He testified that he had computed coordinates from the notes and plotted them on his drawing in accordance with standard engineering practice. He then identified another drawing, marked as exhibit R-19, as his original and accurate plan view, and averred that various markings on the sheet were added by one Larry Snyder, whom he identified as the company's head of safety and environment (Tr. 491). Exhibit A-2, according to Baird, reflected the revisions ordered by Snyder which extended and widened the lower (6470) bench across the face of the C-1 pit (Tr. 492, 494). Baird asserted that the changes were freehand exercises by Snyder, based upon no new survey data (Tr. 495, 532, 573).

The witness then compared two separate sets of the cross-sectional drawings which were tied to reference points on the plan view. The first set, he testified, were prepared by him and a fellow draftsman. They were based upon measurements of the overhangs and the known elevations of the benches. The remaining features were drawn from observations of photographs and slides and were therefore not as precise. (Tr. 498, 499, 527, 528). Baird maintained that the second set of diagrams, which were intended for introduction at the hearing, contained a number of alterations made by persons unknown to him. Generally, according to Baird, the cross sections were added to and altered to show a wider bench in conformance with Snyder's changes on the plan view (Tr. 508). On the 4X cross section, for example, he pointed to a change which widened the bench about 2 1/2 feet (Tr. 551). Baird maintained that he had observed the lower bench remnant at the 6470 foot elevation, and that the first set of drawings accurately represented its dimensions, while the second set did not (Tr. 497, 569). Both sets of all the drawings were offered by the Secretary and admitted without objection.

No more evidence was taken after Baird's testimony. On the basis of the record before me, I am not prepared to hold whether or not the second set of drawings were "falsified" as the Secretary contends. Such a holding is not necessary to reach a proper decision on the merits of this case. Perhaps some satisfactory explanation for the changes exists, and it would be presumptuous of me to conclude that outright misconduct occurred when it is likely that the evidence adduced before Judge Boltz dealt at greater length with the drawings.

I did find Baird an earnest and believable witness with no discernable motive for dissembling. At the very best, the process by which the final set of drawings came about betrays a subjectivity, a flexibility, which robs them of any weight favorable to Minerals. Beyond that, even if the modified drawings were accepted as accurate, they would not persuade me of the absence of violation. Various of the cross sections show substantial overhangs; and even the widest versions of the lower bench would not appear sufficient to keep a major materials fall from reaching the pit floor. The credible evidence proves violation. 3/

We now consider whether the violative conditions constituted an imminent danger. Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

Section 107(a) of the Act sets out the procedures for issuance of withdrawal orders when an inspector finds an imminent danger. It provides:

> If, upon any inspection or investigation of a coal or other mine which is subject to this Act, an authorized representative of the Secretary finds that an imminent danger exists, such re-

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3/ One of the stipulated exhibits in the agreement for a decision on the present record appears to give further credence to Baird's testimony. The diary of Chris Hill, identified as Baird's immediate supervisor, contains this entry for June 3, 1981:

> Larry Snyder redesigned our survey of 5-29-81 in Pit 1 6470 bench. He told Brain [sic] the draftsman to draw in bench that is not there.

I note, however, that my determinations as to the worth of the survey drawings were predicated upon Baird's unrebutted testimony and would have been the same without the diary evidence.

I also note that another diary entry relating to the mining out of a bench on the east wall did not influence my decision as to the existence or non-existence of a lower safety bench. This entry, standing alone, did not identify the bench with sufficient clarity.

presentative shall determine the extent of the area of such mine throughout which the danger exists, and issue an order requiring the operator of such mine to cause all persons, except those referred to in section 104(c), to be withdrawn from, and to be prohibited from entering, such area until an authorized representative of the Secretary determines that such imminent danger and the conditions or practices which caused such imminent danger no longer exist. The issuance of an order under this subsection shall not preclude the issuance of a citation under section 104 or the proposing of a penalty under section 110.

In imminent danger cases the Secretary must establish a prima facie case. The ultimate burden of proof, however, is then borne by the applicant, who must show by a preponderance of the evidence that no imminent danger existed. Otherwise, the order of withdrawal must be affirmed. Lucas Coal Company, 1 IBMA 138 (1972).

Old Ben Coal Corporation v. Interior Board of Mine Operation's Appeals, 523 F. 2d 25, 32 (7th Cir. 1975) approved this test for imminent danger:

> [W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

The Secretary presented strong evidence as to the immediacy of the danger presented by the soil conditions on the lip of the 6540 bench. Inspector Wolford, whose many years experience as a miner and inspector in open pit operations was supplemented by thirty hours of specialized training in ground control (Tr. 23), believed the overhangs "could come down at any time" (Tr. 44). Mr. Lyda, who specializes in ground control matters found "a very good potential for a fall of ground" (Tr. 175), though no one could say when it would come down (Tr. 198). He was certain that either isolated or massive falls - as much as 300 to 400 tons - would eventually occur (Tr. 176-177), and that mining operations should not be permitted "within close proximity" (Tr. 272). Supervisory inspector Jacobson believed that a fall could have occurred at "any second" (Tr. 410). Wyoming inspector Fink did not issue a Wyoming "closure order" because the federal authorities had already acted. He stated, however, that he concurred with the opinions of Lyda and Wolford as to the presence of loose materials and overhangs which "could come down at any time" (Tr. 349-351).

This unanimous body of opinion was essentially unrebutted by Minerals. I do note that none of the inspecting group witnessed any sloughage or falls of rock from the unstable areas during the time of the inspection. This fact alone does not detract in any significant way from the array of

objective indications of instability observed by all the inspecting personnel who testified. No one suggests that large falls are always proceeded by small ones; and it is axiomatic that moments before any highwall falls, it stands. A determination of imminent danger is necessarily judgmental in nature. I must conclude that the judgments of the inspectors were sound: that the condition of the wall posed a likelihood - though not a certainty - that a large fall of rock could occur at any moment, imperiling the lives of the miners working near the toe of the wall. The facts warranted the issuance of a withdrawal order.

Similarly, Inspector Wolford properly designated the violation of the standard as "significant and substantial." Such violations are defined in section 104(d) of the Act as those which "... could significantly and substantially contribute to the cause and effect of a coal or other mine safety and health hazard." The definition has been further construed by the Commission to mean those violations where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." Secretary v. Cement Division, National Gypsum Co., 3 FMSHRC 822 (1981). This same case also makes it clear that a significant and substantial violation may properly be charged in a 104(a) citation.

Since the facts before me indicate that the more stringent test of an imminent danger has been met, there can be no doubt that the violation of 30 C.F.R. § 55.3-5 was significant and substantial. There was a reasonable likelihood that a collapse of the unstable area of the highwall would cause injuries of a "reasonably serious nature" to any or all of the six miners working in the pit floor near the wall.

Before moving to the question of an appropriate penalty, several dismissal motions made early in the hearing must be disposed of. Ruling was reserved at the time they were made.

First, Minerals argues that the withdrawal order lacked the specificity demanded by section 107(c) of the Act wherein it requires a "detailed description" of the conditions which constitute the imminent danger as well as a "description" of the area from which miners are to be withdrawn. The thrust of the argument appears to be that this is an absolute due process requirement which is unaffected by the actual knowledge of the operator. The argument lacks merit. The statutory provision does no more than require that an operator have reasonable notice of the identity of the hazard and the part of the mine affected. The citation speaks in terms of overhanging banks and loose ground on the east wall of the C-1 pit and identifies the miners endangered. It thus meets any specificity requirements of the Act.

Beyond that, had Minerals entertained any genuine doubts as to any particulars of the order, it could easily have availed itself of any of the discovery techniques available under the Commission Rules to resolve those doubts. Cf Evansville Materials, Inc., 3 FMSHRC 704 (1981). Actually, it

was apparent as the hearing progressed that Minerals at no time had any significant questions as to the particulars of the government's allegations.

Second, Minerals argues that the standard itself is impermissibly vague because it contains "no guidelines to establish the conduct of the inspector with regard to what is and what is not dangerous." This argument, too, lacks merit. Standards must often be made "simple and brief in order to be broadly adaptable to myriad circumstances." Kerr-McGee Corporation, 3 FMSHRC 2496 (1981). Terms such as "unsafe" or "dangerous" appear frequently in mandatory standards. Thus, in Alabama By-Products Corporation, 4 FMSHRC 2128 (1982), Docket No. BARB 76-153, the Commission declared:

> [I]n deciding whether machinery or equipment is in safe or unsafe operating condition, we conclude that the alleged violative condition is appropriately measured against the standard of whether a reasonably prudent person familiar with the factual circumstances surrounding the allegedly hazardous condition, including any facts peculiar to the mining industry, would recognize a hazard warranting corrective action within the purview of the applicable regulation.

See also Ryder Truck Lines, Inc., v. Brennan, 497 F. 2d 230 (5th Cir. 1974), United States Steel Corporation, 5 FMSHRC 3 (1983), Docket No. KENT 81-136, January 27, 1983. The standard cited in the present case meets constitutional requirements.

Minerals also attempted to exclude all evidence gathered by the Secretary after the issuance of the withdrawal order. Such evidence, Minerals claims, cannot be considered in determining whether the elements of an imminent danger were present at the time the inspector made the order. Specifically, the operator is concerned about observations made by the Secretary's personnel on February 17, 1981. The photographs of the east wall introduced by the Secretary were made on that day, as were the observation of cracks on the surface of the 6540 bench.

Minerals is correct, of course, that after-acquired evidence must be examined closely to determine whether it is truly relevent to conditions as they existed at the time of the order. Here the photograph was unquestionably relevant since witnesses who were present on the date of the original inspection testified without contradiction that the dangerous features on the highwall had not changed. As to the cracks on the surface of the 6540 bench (the inspection party did not climb to the top of the bench until the subsequent visit on February 17), Mr. Lyda testified with certitude that the fractures behind the overhangs, although they may have enlarged "microscopically" between February 11 and 17, were such that

they could not have been newly formed since the date of the order (Tr. 186-187, 250-251, 289-290). 4/ The thrust of his testimony was that unstable ground formations such as he observed, once in existence, invariably move slowly and deteriorate until a failure or fall occurs, but that no one can predict the precise time of such a collapse. The evidence gathered on the surface of the 6540 bench on February 17, 1981 was therefore relevant to conditions on February 11.

PENALTY

After Minerals removed the overhangs and the Secretary terminated the withdrawal order in September 1981, the Secretary proposed a civil penalty of $1,250.00 for the alleged violation. 5/

At the outset of the hearing, the parties stipulated that the mine employed 280 persons and mined 60 tons of materials daily. In the stipulations which were a part of the agreement to submit the case for decision upon the present record, the parties represented that Minerals is a large uranium mine operator; that assessment of a penalty will not affect its ability to continue in business; and that an appended computer printout furnished by the Secretary shows the violations alleged against Minerals during the two years prior to the February 1981 withdrawal order, and whether the proposed penalties were paid or contested. The data show that 154 violations were assessed and 104 were paid, for a total amount of $14,330.00.

On the record before me, few of the statutory penalty criteria tend to favor Minerals. Its size is large, and the assessment of a significant penalty will not jeopardize its ability to continue in business. The gravity of the violation was high in that the lives of several miners were clearly endangered. The operator's negligence was also high; the hazardous lip of 6540 bench was visible to anyone inclined to look. Even for a large mine, Minerals' history of prior violations and penalties is far from positive. As to good faith, the evidence does indicate that Minerals responded quickly in building a berm on the pit floor to isolate miners from falling rock after the federal inspector issued his withdrawal order.

4/ The record contains considerable testimony about whether the fractures were "gas cracks" originating at the time the area below the 6540 bench was blasted during the mining process, or whether they were "tension cracks" created by natural pressures owing to structural weakness. The question need not be decided since the evidence shows that Mr. Lyda made his evaluation of significant instability on the assumption that they were tension cracks, which are usually somewhat less serious than gas cracks (Tr. 287-289).

5/ Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the size of the operator's business, its negligence, its ability to continue in business, the gravity of the violation, and the operator's good faith in seeking rapid compliance.

Minerals should not be penalized for delaying further abatement by exercising its statutory right to secure review of the validity of the withdrawal order.

I conclude that the facts warrant imposition of a civil penalty of $1,250.00.

FINDINGS OF FACT

Upon the entire record, and in conformity with the findings embodied in the narrative part of this decision, the following findings of material fact are entered:

(1) Minerals operates an open pit uranium mine near Rawlins, Wyoming.

(2) On February 11, 1981, six miners were working on the floor of the C-1 pit as close as two feet from the toe of the east highwall.

(3) Far above these miners several areas of overhanging rock and a single area of loose and unconsolidated rock were located on the lip of the 6540 foot safety bench.

(4) The wall below the 6540 lip lay at a slope of approximately 3/4 to 1. On the date of inspection there was no safety bench, or remnant of any former safety bench, of sufficient width to catch or interrupt the fall of rock should it break loose from the upper bench.

(5) Had any significant part of the loose or overhanging rock fallen, it would likely have killed or severely injured one or more of the miners working below it.

(6) The loose and overhanging rock was unstable and likely to fall at any moment, without warning, and before the hazard could be abated.

(7) Minerals is a large mine operator.

(8) Imposition of a significant civil penalty would not impair Minerals' ability to continue in business.

(9) The loose and overhanging rock on the lip of the 6540 bench was readily apparent, and Minerals knew or should have known of its existence and the hazard it presented.

(10) Minerals acted with dispatch in building a berm on the floor of the C-1 pit to keep miners out of the danger area when the Secretary's inspector issued his imminent danger withdrawal order on February 11, 1981.

CONCLUSIONS OF LAW

Pursuant to the findings in this matter, it is concluded that:

(1) The Commission has jurisdiction to decide this matter.

(2) The conditions on the lip of the 6540 foot bench above the area where miners were working violated the mandatory standard published at 30 C.F.R. § 55.3-5.

(3) The violation was "significant and substantial" as that term is used in section 104(d) of the Act.

(4) The violation constituted an "imminent danger" as that term is defined in section 3(j) of the Act and used in section 107(a) of the Act.

(5) The Secretary's issuance of a withdrawal order under section 107(a) of the Act was warranted.

(6) The violation warrants the imposition of a civil penalty against Minerals in the amount of $1,250.00.

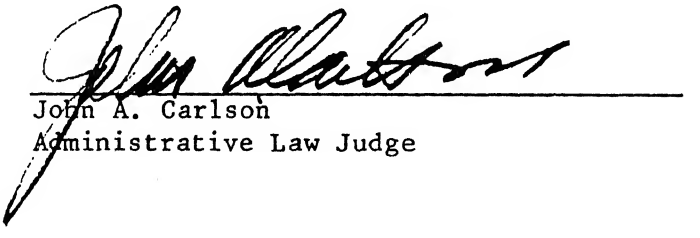
ORDER

Accordingly, it is ORDERED that:

(1) Minerals' application for review of the withdrawal order issued February 11, 1981 is dismissed, and that order is affirmed.

(2) The citation issued under section 104(a) of the Act contemporaneously with the withdrawal order is affirmed.

(3) Minerals shall pay to the Secretary, within 30 days of the date of this present order, a civil penalty of $1,250.00.



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Administrative Law Judge

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APR 6 1983

LEO KLIMCZAK, Complainant	:	Complaint of Discharge, Discrimination, or Interference
v.	:	
	:	Docket No. YORK 82-21-DM
GENERAL CRUSHED STONE COMPANY, INC., Respondent	:	MD 81-132
	:	Rochester Mine

DECISION

Appearances: Richard A. Dollinger, Esq., Greisberger, Zicari, McConville, Cooman & Morin, P.C., Rochester, New York, for Complainant; Joseph E. Boan, Esq., Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Melick

This case is before me upon the complaint of Leo Klimczak under section 105(c)(3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., the "Act", alleging that the General Crushed Stone Company (General) discharged him on June 29, 1981, in violation of section 105(c)(1) of the Act. 1/ Evidentiary hearings were held on Mr. Klimczak's complaint in Rochester, New York.

In order for Mr. Klimczak to establish a prima facie violation of section 105(c)(1) of the Act he must prove by a preponderance of the evidence that he has engaged in an activity protected by that section and that the discharge of him was motivated in any part by that protected activity. Secretary ex rel. David Pasula v. Consolidation Coal Co., 2 FMSHRC 2786 (1980), rev'd on other grounds sub nom, Consolidation Coal Co. v. Secretary, 663 F.2d 1211 (3rd. Cir. 1981). Before his discharge on June 29, 1981, purportedly for excessive absenteeism and a bad work attitude, Mr. Klimczak had been employed by General for almost 9 years as a mechanic welder. In this case, he asserts essentially four claims of protected activity. While challenging some of the details of

> 105(c)(1) of the Act provides in part as follows: "No person
> ge * * * or cause to be discharged or otherwise interfere with
> f the statutory rights of any miner * * * in any * * * mine sub-
> because such miner * * * has filed or made a complaint under
> s Act, including a complaint notifying the operator or the
> or the representative of miners at the * * * mine of an
> health violation in a * * * mine * * * or because such miner
> ited or caused to be instituted any proceeding under or
> * * or because of the exercise by such miner * * * on
> others of any statutory right afforded by this Act.

the claims, Respondent, in its brief, does not deny that complaints were in fact made by Mr. Klimczak and that they did in fact concern matters of safety. The thrust of its argument appears to be that those complaints were made in bad faith only to harass mine management and that those complaints were therefore not protected.

While a "good faith" and "reasonableness" test does apply to protected work refusals under section 105(c)(1), Robinette v. United Castle Coal Co., 3 FMSHRC 1803 (1981), I find no similar requirement under that section for protected safety complaints. In Munsey v. FMSHRC, 595 F.2d 735 (D.C. Cir. 1978), it was held that no such requirement existed (for protected safety complaints) under the similar anti-discrimination provisions of former section 110(b) of the Federal Coal Mine Health and Safety Act of 1969. The Court in Munsey was understandably concerned that imposing any "good faith" or "not frivolous" test for safety complaints would discourage the reporting of such complaints. The rationale of the Munsey decision is persuasive and I find nothing in the 1977 Act or its Legislative History to suggest that the same rationale and conclusion should not also apply to the comparable provisions of section 105(c)(1). Under the circumstances, it is not necessary at this point in the analysis to determine whether the safety complaints made by Mr. Klimczak in this case were "reasonable" and made in "good faith". Those complaints were, in any event, activities protected by the Act.

The first of these protected activities occurred during February 1981 when Mr. Klimczak complained to Assistant Mine Superintendent Ben Gardner, to his union representative (shop steward) Sam Metrano, and to his group leader (foreman), Charlie Solt, about his need for an assistant to help with his welding. Klimczak testified that he had twice been injured while struggling alone with large sheets of steel and had complained to each of these men about his need for a shop assistant to help him safely perform his work. While Solt admitted at hearing that Klimczak had complained to him about the absence of a shop helper, Solt denied that Klimczak said it was unsafe for him to work alone. Solt did not deny however, that he then knew Klimczak had previously been injured while struggling without assistance with large sheets of steel. It may therefore reasonably be inferred that Klimczak's complaints to Solt regarding his need for help was a complaint about an alleged danger within the meaning of section 105(c)(1). Moreover, neither Ben Gardner nor Sam Metrano testified in this case and no affirmative evidence has been presented to suggest that they had not received complaints of the alleged danger from Klimczak. Accordingly, I find that Klimczak did make the alleged safety complaints and that the union representative, the group leader, and the assistant mine superintendent were all aware of those complaints.

The second protected activity occurred in March 1981 when Assistant Superintendent Gardner directed Klimczak to weld some duct work from a "bucket" elevated by a crane. Klimczak protested to Gardner that this was an unsafe procedure but went ahead and did the job anyway. As he was being lowered after completing the job, however, an accident occurred in which he was in a "free fall," dropping about 20 feet to the ground. After this incident Klimczak told Gardner and Solt that he would never get in the bucket again. The Mine Superintendent, Thomas Meehan, admitted that he also knew of this incident and, recognizing the danger posed by the bucket, ordered it removed

from service. Meehan also knew that Klimczak had complained about having to work in the elevated bucket. Klimczak's complaint about the safety of the bucket was clearly a protected complaint. In addition, I find that Klimczak's statement that he would refuse to ever again work in the bucket in that manner, was also a protected work refusal. There is no dispute that this anticipatory work refusal was reasonable under the circumstances and made in good faith. Robinette, supra.

The third protected activity occurred in April 1981. Klimczak was directed by Gardner to "hot weld" a gas cap hinge onto the crane within 12 to 14 inches of its unpurged gas tank. It is not disputed that welding in such a manner is indeed unsafe. Accordingly, Klimczak's protestation to Gardner that the assigned task was dangerous is also a protected safety complaint. The fourth and final protected activity occurred sometime in May 1981. 2/ Gardner had directed Klimczak to reweld some cracks located some 10 to 20 feet above ground in an area of the portable crusher that had no hand rails. While agreeing to do the job, Klimczak told Gardner that that would be the last time he would work on the equipment without a ladder or catwalk and threatened to report the condition to a Federal inspector.

Since Mr. Klimczak has established that he did in fact make protected safety complaints to the operator in February, March, April, and May, 1981, and did engage in a protected work refusal in March 1981, it is necessary, following the Pasula analysis, to next determine whether the operator, in discharging him, was motivated in any part by those protected activities.

Direct evidence of motivation in section 105(c) discrimination cases is, of course, rare and indirect or circumstantial evidence must ordinarily be relied upon by the Complainant. Secretary ex rel Chacon v. Phelps Dodge Corp., 3 FMSHRC 2508 (1981), pet. for review filed, No. 81-2300 (D.C. Cir. December 11, 1981). In this case, Klimczak cites several circumstantial factors that he contends demonstrate that his discharge was motivated by his protected activities. He alleges that agents of the operator had knowledge of his protected activities, that management showed hostility towards his protected activities, that he was accorded disparate treatment vis-a-vis other employees committing equally or more serious breaches of conduct, and that there was a coincidence in timing between the protected activities and the subsequent discharge.

With respect to the first allegation, the evidence is indeed uncontradicted that the assistant mine superintendent, Ben Gardner, knew of each of the protected activities and it was Gardner who composed the discharge letter based in part on his own personal knowledge (from his diary) of the Complainant's work history. In addition, Mine Superintendent Thomas Meehan admitted that he was aware of Klimczak's complaints about riding in the elevated

2/ Klimczak reported in his initial complaint to MSHA, filed July 13, 1981, that this incident occurred in late May 1981, but testified at hearing more than a year later than the incident occurred on June 24, 1981. I find the former statement to be more likely correct since it was made only a short time after the event. Klimczak's time sheets also show him to have been welding on the portable crusher during May and on June 2nd but not on June 24th.

bucket. 3/ In light of the close working relationship between Gardner and Meehan it is reasonable to infer that Meehan was also aware of the other safety complaints as well. In any event, although Meehan contradicts himself on this point, I accept Meehan's admission that the decision to discharge Klimczak on June 29, 1981, was a joint decision by Gardner and himself. Within this framework of evidence it is clear that those responsible for Klimczak's discharge together had knowledge of all of Klimczak's protected activities.

Klimczak next claims that mine management showed hostility towards his protected activities by allegedly failing to follow the disciplinary procedures set forth in the collective bargaining agreement (Agreement) and by the alleged arbitrary manipulation of its absentee and vacation policies against him. 4/ Article II Section 4 of the Agreement sets forth the right of management to discharge an employee for excessive absenteeism. (Joint Exhibit No. 1). It provides as follows:

> Management maintains the right to discharge an employee for excessive absenteeism. Absenteeism means absence from the job without prior notice to and consent of the company. 5/ Notification will be required by the Employer within one (1) hour after the start of the employee's regular shift. This condition to apply for sickness, accident, etc., where prior notice as provided could not be given. Excessive absenteeism means absenteeism four (4) times within a calender year. The first absence without good cause brings a written warning from the company; second absence within thirty (30) days of the previous absence shall bring suspension without pay for two (2) days; third absence within thirty (30) days of the second absence shall bring a suspension without pay for one (1) week (five [5] scheduled workdays). Four (4) such absences within the calendar year shall be cause for discharge.

3/ In light of this I give little credence to Meehan's subsequent responses to leading questions suggesting that he was not aware of Mr. Klimczak making any "safety complaints."

4/ The factual analysis of these allegations is inextricably tied to the Respondent's alternative defense that it would have discharged Mr. Klimczak in any event for his unprotected activities alone and with the Complainant's rejoinder that the proffered defense was only a pretext. Accordingly, the analysis of this evidence is relevant to all of these arguments. In this stage of the analysis, however, the Complainant has the burden of proof. Pasula, supra.

5/ Superintendent Meehan testified that he considered an absence "excused" during the regular work week (Monday through Friday) so long as the employee notified the company of his absence within 1 hour after the start of his shift. There was therefore no need to have the company's formal "consent" before the absence was considered excused.

In support of his argument that General applied its absentee policy in a discriminatory manner, Klimczak alleges that it did not follow the disciplinary procedures set forth in the Agreement and that it arbitrarily altered his attendance records retroactively by changing previously excused absences to unexcused absences and by counting as "unexcused" absences 10 days that he was on workers' compensation in February, 1981. The record does in fact support the Complainant's contentions that at least some of his absences which had been excused under company policies then in effect were later converted to unexcused absences. Meehan so much as conceded that Klimczak could have successfully challenged these in a grievance proceeding. It also appears that Meehan relied upon even Mr. Klimczak's excused and partial absences in concluding that he had a bad attitude toward his work--another reason cited by Meehan for the discharge.

While the use of these procedures may have been grossly unfair and indeed suggest that General may have been determined to use every means, fair or foul, to get rid of Mr. Klimczak, it does not in itself prove that General was determined to get rid of him because of his protected activities. Moreover, in spite of General's apparent reliance on a number of questionable "unexcused" absences I find that the Complainant did in fact have at least four unexcused absences during calendar year 1981. It is not disputed that his absences on April 4, April 11, and May 30, 1981, were unexcused. In addition I find for the reasons set forth below that Klimczak's absence on Friday, June 26, 1981, was also unexcused. Since that absence would have constituted the fourth unexcused absence for the calendar year sufficient cause for discharge would then have existed under the Agreement. 6/

Mr. Klimczak testified that on the morning in question he was scheduled to begin work at 7:00 a.m. He admittedly called in "late", i.e. around 9:00 or 9:30 that morning, to report that he would be late for work. Since the Agreement requires the call to be made within one hour of the start of the shift, the absence here could, on that basis alone, be deemed an unexcused absence. In any event Klimczak claims that in this telephone call he talked to the company clerk, Wesley Lane, and told him that he "had to go get papers

6/ I do not agree with the Complainant's contention that under Article II Section 4 of the Agreement the Respondent could not have discharged him without first warning or suspending him for his first three absences. He cites no interpretive authority for his position and as I read the Agreement the only procedural requirement for discharge on the basis of absenteeism (or any other reason) is the warning notice set forth in Article I Section 7 of the Agreement. Mr. Klimczak had received such notice on June 1, 1981 (Exhibit No. R-9). I note that Mr. Klimczak did not challenge this or any other aspect of his discharge under the grievance procedures set forth in the Agreement.

from the Compensation Board, and [his] car was broke down." 7/ Mr. Klimczak testified that he later appeared on the job but only to pick up papers "for the Compensation Board" and to pick up his pay check to pay for his car repairs.

Office clerk, Marcia N. Mott, testified that it was actually she who received Klimczak's phone call on the morning of June 26. Klimczak told her that he would be late because his car had broken down and that he would show up later that day. Ms. Mott passed this information to her supervisor Wesley Lane and, several hours later, around lunch time, she saw Klimczak come in and pick up his pay check. She noticed the smell of alcohol on his breath.

Office Manager Wesley Lane, recalled being advised of Klimczak's telephone call. Later that day he saw Klimczak in the office talking with Superintendent Meehan. When Lane asked the Complainant if he was planning on working that day, he responded with a profanity. Lane also smelled alcohol on Klimczak's breath. In light of Klimczak's behavior, apparently influenced by alcohol, Lane assumed he would be unable to work. He accordingly marked Klimczak absent for the day.

Superintendent Meehan came into the office around ten o'clock that morning. Klimczak was in the hallway ready to leave. He smelled of the odor of alcohol. Klimczak explained that he had called in because of car trouble and then proceeded to complain about the "incompetence" of the assistant superintendent. He then said to Meehan "when Sam [Mitrano] and Charlie [Solt] go on vacation I'll show you how dumb I am when something breaks down and needs to be fixed." Meehan interpreted this to mean that if something broke down at the plant Klimczak would not "oversucceed" himself to fix it even though he would be capable of doing so. The decision to dismiss Klimczak was made a short time after this confrontation.

The Complainant argues that even if his absence on June 26 was otherwise unexcused, since he was subsequently awarded Worker's Compensation benefits corresponding to the time lost on that date, that absence could not under New York law be considered an "unexcused" absence. See Griffin v. Eastman Kodak Co., 436 N.Y.S. 2d 441 (1981) and LaDolce v. Regional Transit Serv. Inc., 429 N.Y.S. 2d 505 (1980). While it is undisputed that Mr. Klimczak had subsequently been awarded Workers' Compensation corresponding to a period of time including June 26, 1981, I find that to be irrelevant to the issue of whether he had complied with the requirements of the Agreement for an excused absence. By his own admission, he did not call his employer within one hour of the commencement of his shift as required. Moreover, when he did call, it is clear from the credible evidence that he reported only that he would be late

7/ Inasmuch as Mr. Klimczak presented several contradictory versions of what he purportedly told Mr. Lane, that Mr. Lane and office clerk Marcia Mott testified that she, not Lane, actually received Klimczak's call, that Mr. Klimczak has shown some difficulty recalling this and other events, and that credible testimony from several other witnesses show that Mr. Klimczak may have been under the influence of alcohol that morning, I accord the testimony of other witnesses concerning the events on the morning of June 26th the greater weight.

for work and did not request an excused absence for the day. According to company policy his failure to report for work under these circumstances warranted an unexcused absence. Finally when he did later appear at the office, his condition was apparently so affected by alcohol that the time clerk considered him unable to work. His absence on June 26, 1981, may therefore be considered an unexcused absence. Since I have found that Mr. Klimczak failed to report to work on June 26 for reasons other than "work related" injuries, the cited New York law is, for this additional reason, inapposite. Accordingly, as of June 26, 1981, the Complainant had four unexcused absences within calendar year 1981 and, under the Agreement, sufficient cause then existed for his discharge independent of any other reason.

The Complainant next alleges, as evidence of an unlawful motivation, that he was singled out for special disciplinary treatment because other employees had more absences over a shorter period of time but escaped without serious discipline. He first alleges that co-worker Richard L. Cowd was absent 12 times in a 3-month period without ever having been disciplined. The uncontradicted testimony of Superintendent Meehan is, however, that those absences were excused and accordingly would not be considered towards disciplinary action. Complainant next cites the record of co-worker Miller, who reportedly missed 11 days over a 6-month period. Superintendent Meehan testified, again without contradiction, that Miller's absences were all excused and therefore, again, could not be used for disciplinary purposes. Finally, the Complainant cites the records of co-worker Wright, who admittedly did receive a warning letter for absenteeism. It is alleged that Wright had missed 8 days in February and March 1981 and had received an excused absence for Saturday, March 11. Meehan testified that even though Wright did in fact receive a warning letter, all of his absences had nevertheless been excused. Within this framework of evidence. I cannot conclude that Mr. Klimczak received discriminatory treatment vis-a-vis the other employees. Klimczak had clearly accumulated four unexcused absences as of the time of his discharge whereas the uncontradicted evidence shows that none of the other employees cited had accumulated any unexcused absences.

The Complainant contends, finally, that unlawful motivation is shown in this case by the close proximity in time between the safety complaints and his discharge. It is a matter of record that the safety complaints were made in January, March, April, and May of 1981. However, the evidence shows that Complainant had received his first warning letter concerning absenteeism and work attitude as early as September 8, 1980, four months before his first safety complaint. While the second warning letter did come after two, and possibly three, of Klimczak's protected safety complaints, that letter also followed his unexcused absences on April 4 and 11. The third warning letter, dated June 1, 1981, also happened to follow another protected safety complaint (in May 1981) but this letter, just as the others, also followed another one of Klimczak's unexcused absences. In accordance with my findings (footnote 2 supra.) there were no protected activities between the third warning letter and the letter of discharge issued June 29, 1981, but there was an unexcused absence on June 26, 1981. It would not be reasonable to infer from this inconclusive evidence that any causal relationship existed between the protected activities on the one hand and the warning letters and discharge on the other.

In summation, I do not find any direct nor sufficient circumstantial evidence of unlawful motivation in this case under section 105(c)(1) of the Act. While there is no doubt that those responsible for Mr. Klimczak's discharge were aware of his protected activities and there is evidence that some of Complainant's past absences may have been unfairly manipulated in building a record against him, I do not find these circumstances to be sufficient, in light of the other credible evidence, to establish a prima facie case. There were clearly a sufficient number of unexcused absences in this case to have warranted Complainant's discharge under the Agreement, there was no evidence that the Complainant was given less favorable treatment than other employees and no inferences can be drawn from the timing of the protected activities and the Complainant's discharge.

Other grounds for discharge also existed which Meehan characterized as a bad work attitude. The evidence shows that Klimczak regularly failed to appear for Saturday work after agreeing to do so and he did not deny the evidence that he had a problem with alcohol that affected his work. Moreover the statement he made on June 26 to Meehan that "I'll show you how dumb I am when something breaks down and needs to be fixed," might reasonably be construed as a threat to subvert or sabotage company operations.

Under all the circumstances, I do not find that the Complainant has met his burden of proving a prima facie case. Respondent has in any event established credible "business justifications" to have discharged Mr. Klimczak exclusive of any protected activities and it is apparent that it would have discharged him for his unprotected activities alone. Pasula, supra. Accordingly, the complaint of unlawful discharge is denied and this case is dismissed.

Gary Melick
Assistant Chief Administrative Law Judge

Distribution: By certified mail

Richard A. Dollinger, Esq., Greisberger, Zicari, McConville, Cooman & Morin, P.C., 25 East Main Street, Rochester, NY 14614

Joseph E. Boan, Esq., Corporate Labor Relations Representative, Koppers Company, Inc., Pittsburgh, PA 15219

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 12 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA),	)	CIVIL PENALTY PROCEEDING
Petitioner,	)	DOCKET NO. CENT 80-356-M
v.	)	
JOHN H. MIDDLETON,	)	
Respondent.	)	

Appearances:

J. Phillip Smith, Esq., Office of the
Solicitor, United States Department of Labor
Arlington, Virginia 22203
for the Petitioner

John H. Middleton, appearing pro se,
Lyons, Kansas
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor of the United States, the individual responsible with enforcing the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq., (the Act) charges John Middleton with violating Section 110(c) of the Act.

Section 110(c), now codified at 30 U.S.C. § 820(c), provides:

> (c) Whenever a corporate operator violates a mandatory health or safety standard or knowingly violates or fails or refuses to comply with any order issued under this Act or any other incorporated in a final decision issued under this Act, except an order incorporated in a decision issued under subsection (a) or section 105(c), any director, officer, or agent of such corporation who knowingly authorized, ordered, or carried out such violation, failure, or refusal shall be subject to the same civil penalties, fines, and imprisonment that may be imposed upon a person under subsections (a) and (d).

The Secretary specifically charges John Middleton with knowingly authorizing, ordering, or carrying out a corporate operator's violation of 30 C.F.R. Section 56.9-3, 1/ a mandatory safety standard adopted under the Act.

After notice to the parties a hearing on the merits was held in Wichita, Kansas.

The parties filed post trial briefs.

Issues

The issues are whether a violation of the Act occurred, and, if so, what penalty is appropriate.

Applicable Case Law

In Secretary of Labor v. Kenny Richardson, 3 FMSHRC 8 (1981), the Commission held section 110(c) of the Act to be constitutional and enunciated the critical elements which constitute a violation of this section. The corporate operator must first be found to have violated the Act. In addition, a violation occurs if a person in authority knows or has reason to know of the violative condition and fails to act on the basis of that information.

The Commission adopted the rule that "knowingly" as used in the Act does not necessarily have any connotation indicating bad faith, evil purpose, or criminal intent. Rather, its meaning is the same as in contract law: knowing means having actual knowledge or having acquired sufficient facts that the person should have known of the condition. 3 FMSHRC at 16.

Petitioner's Evidence

Petitioner's witnesses included MSHA inspectors Elmer D. King and David P. Lilly. In addition, Richard Jones and Richard Brayton, employees of Tobias and Birchenough, Inc., (Tobias), at the time of the inspection testified in the case.

On November 16, 1979 MSHA inspector Elmer King, a person experienced in mining, inspected an Allis Chalmers front end loader on the worksite of Tobias (King 7-9, 12, 19, 20; C2).

The inspection was made after Dick Jones, Tobias' superintendent, called the MSHA Topeka office and complained the loader had no brakes (King 9, 10, 17; Jones 44, 45).

1/ The cited standard provides as follows:

56.9-3 Mandatory. Powered mobile equipment shall be provided with adequate brakes.

King went to the site, checked the loader and found it had no brakes. King tested the loader. The brakes would not hold on an incline or on an elevated roadway. He ran three tests in various operating modes. There were absolutely "no brakes" (king 10, 12, 23). The loader operator could not stop the vehicle other than by using forward and reverse gears. In this hazardous situation a loader could overturn and cause a severe injury or a fatality (King 21, 22, 26; Lilly 67, 68).

King then issued an imminent danger withdrawal order. He served it on John Middleton, Tobias' president (King 11, 12, 14, 20; C1).

Brayton, the loader operator, stated this was the only loader at the plant. Brayton was operating the loader on orders from John Middleton (King 17, 24). The brakes had been inadequate for five or six weeks (Brayton 55).

At the time of the November 16 inspection this loader, a powered mobile piece of equipment, was hauling sand and gravel to a stockpile (King, 14, 16).

Jones and Brayton had complained to John Middleton that the loader needed brakes. The brakes were adjusted October 29, 1979 but the adjustment didn't take care of the problem and they were in worse condition on November 16th (King 24, 25, 32; Jones 42, 43, 47; Brayton 52, 54, 57; Lilly 61, 62).

The brakes were adjusted on both occasions by Sellers Tractor Company of Salina. The initial Sellers service report, dated October 29, states in part: "Also rebuilt master brake cylinder, and adjusted brakes best as possible. They are all fourn worn out" (Lilly 62-63; Exhibit C4).

After the November 16 withdrawal order Sellers performed the following work on the loader; "Removed all four wheels and wheel cylinder. Cleaned up and had drum turned. Had to replace one new wheel cylinder. Rest were rust spotted and rough. Turned drums and new 5/16 lining with 1/8 shim lining. Put kit in one wheel cylinder. Checked planetaries and found one set of rear planetary shafts bad and one rear ring gear. Rest OK. New bearing and seals and assembled, adjusted and bled brakes. They worked OK. Had given through (sic) master cylinder before. Got good brakes" (Exhibit C5).

Before the November 11 inspection, and specifically on November 1st, the MSHA representative inspected this same loader. At that time he felt the brakes were getting bad and should be repaired (King 27, 36, 37). At that time Jones said he'd bring it to Middleton's attention (King 37). On November 1st, the brakes held in the tests conducted by the inspector. But they did not hold to the point where they were adequate (King 37). King, at the hearing, opted that he should have withdrawn the equipment at that time (King 37).

At the conclusion of the November 1st inspection King told loader operator Brayton that he would stop in Lyons and advise Middleton of his findings. But the inspector later changed his mind about contacting Middleton because Jones was identified as being in charge of safety and

health on Tobias' legal identity form (King 37-40). As a result the inspector didn't go to Lyons (at the home office, nine miles away) to discuss the situation with Middleton (King 39, 40, 49).

The loader was never taken out of service after Jones complained to Middleton. While Jones wanted it withdrawn he didn't have the authority to go over John Middleton (Jones 44, 45). Middleton never told anyone the machine had to be operated but he knew it was in daily use (Jones 45).

Tobias, a sand and gravel operation, sells its products to various places. Its products are used in the construction of public roads (King 13, 14).

The vehicle cited here, a 1971 model Allis Chalmers weighing 10 1/4 tons, was manufactured in La Porte, Indiana (King 12, 13).

Tobias, the corporate operator, paid a civil penalty for this violation. Payment was made at the assessment office level (King 25, 26).

Respondent's Evidence

John Middleton testified on his own behalf.

The first information coming to John Middleton's attention about the brakes was when Richard Brayton told him he was having brake problems. The same day Middleton had superintendent Schwerdtfeger check the brakes. The superintendent reported there was a "brake problem" as well as a problem with the master cylinder (Middleton 72-74).

Middleton called Sellers to do the repair work. After the service Middleton contacted Sellers foreman. The foreman confirmed the fact that the brakes needed repair. Middleton felt that the brakes were sufficient because Sellers has never been hesistant about advising Tobias if there were no brakes (Middleton 75-76). No further statements were made about the brakes to John Middleton until the imminent danger order was received on November 16 (Middleton 76-77).

John Middleton takes exception to the claim that he was grossly negligent and that he endangered the life and limb of his workers (Middleton 80). Middleton agrees there was a brake problem but he did not know the loader was without brakes (Middleton 80).

Tobias is a medium sized sand and gravel operation producing annually 20,000 yards of concrete. The company employs nine to thirteen workers (Middleton 78, 79, 81).

Discussion

The evidence in this case establishes a violation. Tobias and Birchenough, Inc., and its president, John Middleton knew or should have known the brakes were inadequate on or immediately after October 29. On that date Sellers, the brake repair service, adjusted the brakes. They said they couldn't be adjusted further and had to be repaired (King 49). In fact

the Sellers service report, dated October 29, states in part as follows: "Also rebuilt master brake cylinder and adjusted brakes best as possible. They are all four worn out" (Exhibit C-4). If all four brakes are "worn out" the braking system can hardly be said to be adequate. Middleton also knew on October 29th that there was such a problem. He was also advised of that fact by Brayton the loader operator and Jones, his foreman (Middleton 73, 74, 75). But nothing was done until the imminent danger order was issued.

John Middleton, both at the hearing and in his post trial brief, asserts he knew there was a brake problem but he didn't consider it imminently dangerous. Further, he did not knowingly ask anyone to risk life and limb (Middleton 85, 86, Brief).

The test imposed by the regulation is whether the brakes were adequate. Since they were not and since John Middleton should have known of such inadequacy the citation should be affirmed.

CIVIL PENALTY

Section 110(i) of the Act, [30 U.S.C. 820(i)], provides as follows:

> The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

The Secretary proposes a civil penalty of $500 for this violation. The statute authorizes a civil penalty not to exceed $10,000, 30 U.S.C. 820(a).

In considering the statutory criteria I note that John Middleton does not have an adverse prior history. But John Middleton should have known of this condition and the gravity of the violation was severe. Concerning good faith it does appear that John Middleton abated in a rapid fashion after the events of November 16th.

On balance I deem that the proposed civil penalty of $500 is appropriate.

The Solicitor and John Middleton has filed post trial briefs which have been most helpful in analyzing the record and in defining the issues. However, to the extent they are inconsistent with this decision, they are rejected.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

1. Citation 541426 and the proposed civil penalty of $500 are affirmed.

2. Respondent is ordered to pay said penalty to the Secretary of Labor within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

Distribution:

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United States Department of Labor
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Mr. John H. Middleton
President and Treasurer
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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 12 1983

HOMESTAKE MINING COMPANY, Contestant,	CONTEST OF CITATION PROCEEDING
v.	DOCKET NO. CENT 80-416-RM
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	Citation No. 329888
	MINE: Homestake
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner,	CIVIL PENALTY PROCEEDINGS
	DOCKET NO. CENT 81-108-M
	MSHA Case No. 39-00055-05048
	DOCKET NO. CENT 81-109-M
	MSHA Case No. 39-00055-05049
v.	MINE: Homestake
HOMESTAKE MINING COMPANY, Respondent.	

DECISION

Appearances:
Eliehue C. Brunson, Esq., Office of the Solicitor
United States Department of Labor
911 Walnut Street, Room 2106, Kansas City, Missouri 64106
For the Petitioner

Robert A. Amundson, Esq., Amundson & Fuller
215 West Main, Box 898
Lead, South Dakota 57754
For the Respondent

Before: Judge Virgil E. Vail

STATEMENT OF THE CASE

The first case listed in the caption above, Docket No. CENT 80-416-RM, is a notice of contest filed by Homestake Mining Company, (hereinafter "Homestake"), pursuant to section 105(d) of the Federal Mine Safety and Health Act, 30 U.S.C. 815(d), (hereinafter "the Act"), to challenge the validity of citation no. 329888 issued by an inspector of the Mine Safety

and Health Administration, (MSHA), for an alleged violation of 30 C.F.R. § 57.19-100 (1982). The citation alleged that the violation was of such a nature as could significantly and subtantially contribute to the cause and effect of a mine safety or health hazard and that there was an unwarrantable failure on the part of the contestant warranting action pursuant to 30 C.F.R. 104(d)(1) of the Act. Subsequently, in Docket No. CENT 81-108-M, captioned above, the Secretary of Labor (hereinafter "the Secretary"), filed a petition proposing the assessment of penalties based upon eight citations [1]/ issued to Homestake including citation No. 329888 involved in Docket No. CENT 80-416-RM.

In Docket No. CENT 81-109-M, captioned above, the Secretary filed a petition proposing the assessment of a penalty pursuant to section 104(a) of the Act based upon citation no. 567066 issued to Homestake alleging a violation of 30 C.F.R. § 57.12-6.

These three cases were consolidated and a hearing was held in Lead, South Dakota. At the conclusion of the hearing, the parties waived closing arguments and agreed to submit post hearing briefs following receipt of the transcript.

MOTIONS TO DISMISS

At the hearing, the Secretary moved to withdraw the unwarrantable portion of citation No. 329888 under section 104(d)(1) of the Act and amend the type of action to a 104(a) designation and continue with the contention that significant and substantial allegation would still apply. The Secretary contended that the evidence did not support the allegations in the citation that past violations of the same standard existed. Homestake agreed to the withdrawal of the unwarrantable designation in citation No. 329888 and that the remaining issue for trial was the proposed penalty assessment proceeding contained in Docket No. CENT 81-108-M. This motion was approved.

Based upon approval of the motion by the Secretary to amend citation No. 329888 to a 104(a) type of action, Homestake moved to withdraw its notice of contest action thereto. This was granted and Docket No. CENT 80-416-RM was dismissed (Tr. at 8-9).

After receipt of the transcript of the hearing, the Secretary filed a post trial motion to vacate seven of the eight citations included in Docket No. CENT 81-108-M and the one citation included in Docket No. CENT 81-109-M. The basis for this motion was that a review of the testimony and exhibits produced at the hearing did not support the allegations contained in these seven citations. On January 3, 1983, Homestake filed a motion of concurrence. Based upon the representations of the parties, a review of the

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1/ Citation Nos. 567059, 567060, 567061, 567062, 567063, 567064, 567065, and 329888.

evidence, and a belief that the public interest will be served, the motion of the Secretary is approved and the following citations are vacated:

Docket No. CENT 81-108-M

Citation No.	Standard Violated
00567059	57.12-2
00567060	57.12-2
00567061	57.12-2
00567062	57.12-2
00567063	57.12-2
00567064	57.12-2
00567065	57.12-2

Docket No. CENT 81-109-M

Citation No.	Standard Violated
00567066	57.12-6

Also Docket No. CENT 81-109-M is dismissed.

Docket No. 81-108-M

ISSUES

The remaining issues to be decided in this case involved the one citation No. 329888 and whether respondent violated 30 C.F.R. § 57.19-100 of the Act, and, if so, the appropriate civil penalty that should be assessed based upon the criteria set forth in section 110(i) of the Act.

STIPULATIONS

At the hearing, the parties agreed to the following stipulations which were accepted (Tr. 7):

1. Homestake Mining Company is the operator of the gold mine at Lead, South Dakota.

2. Homestake is subject to the jurisdiction of the Federal Mine Safety and Health Act.

3. Homestake's ability to continue in business would not be effected by the assessment of a reasonable penalty in this case.

4. Homestake has been issued prior citations, the number to be reported in a printout furnished by the Secretary. This was to be reviewed by the parties and concurrences as to the total was to be agreed upon.

5. Homestake is considered a large gold mining company.

DISCUSSION

On September 13, 1980, during an inspection of respondent's mine, MSHA inspector Jeran Sprague issued citation No. 329888 which stated as follows:

> A Safety Gate was not installed on the 5300 Level shaft landing in the #6 shaft man cage compartment. There are two 3 x 12 inch boards across the landing but the station is wet and a person could slip and fall between the boards which are approx. 3' feet apart. Electricians and shaftmen use the level or occasional basis to check equipment. On the level is a water storage tank and electrical power box. 2/

Petitioner contends that respondent's failure to have an adequate safety gate at this location violates 30 C.F.R. § 57.19-100 which provides as follows:

> Mandatory. Shaft landings shall be equipped with substantial safety gates so constructed that materials will not go through or under them; gates shall be closed except when loading or unloading shaft conveyances.

Petitioner argues in his post hearing brief that the hazard presented here was that miner could fall into the shaft causing a fatal injury. Such a fall would be approximately 2000 feet or more to the bottom of the shaft. It is contended that the violation should have been obvious to the respondent as all of the other landings in the number 6 shaft had an adequate gate.

Respondent argues that the area cited by the inspector is not a shaft landing as designated to be covered in standard 57.19-100 but is a "cut out." Further, respondent argues that the cited standard does not address itself to the possibility of a miner falling into the shaft but instead requires a substantial gate to prevent materials from falling into the shaft.

The evidence of record shows that the area involved in citation No. 329888 was located at the 5300 foot level in the number 6 shaft and consisted of a room cut out of the wall of the shaft approximately 14 feet deep by 14 feet wide and 10 feet high. This area was used by respondent for the placement of a water tank and two junction boxes for power cables. At the opening to the shaft, two 2 x 10 foot wooden boards had been placed horizontially across the opening. One board was located at the bottom or

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2/ The balance of the description in the body of this citation is not pertinent due to the motion by the Secretary to amend which was granted.

floor level whereas the other was approximately 27 3/4 inches higher. Permanent lighting was not installed at this landing to illuminate the area and miners used their miners' lights when they visited this location. A pipeman would stop at this landing one or two times a month to check the valves and float in the water tank. During the time the pipeman was checking the water tank, the man cage would wait for him. A telephone or call horn has not been installed in this area as is required and used at all shaft stations where work is performed on a regular basis.

The threshold issue to be decided is whether the area cited is a shaft landing as contemplated by mandatory standard 57.19-100. The regulations do not define what constitutes a shaft landing. It does indicate that it is a landing in a shaft where men and material are loaded and unloaded from a shaft conveyance. However, the Bureau of Mines, U.S. Department of Interior, A Dictionary of Mining, Minerals, and Related Terms (1968), defines "shaft" and "landing" as follows:

> Shaft. An excavation of limited area compared with its depth, made for finding or mining ore or coal, raising water, ore, rock, or coal, hoisting and lowering men and materials, or ventilating underground workings. (Emphasis added).
>
> Landing. A level stage in a shaft at which cages are loaded and discharged. Fay c. The mouth of a shaft where the cages are unloaded; any point in the shaft at which the cage can be loaded with men or materials; (Emphasis added).

Admittedly, the area cited here was not a location in the number six shaft where the man cage stopped frequently or where materials were loaded and unloaded on a frequent basis. However, the area had to be inspected by miners on a regular if infrequent schedule and applying the definitions stated above to the fact that the man cage in the number 6 shaft stopped at this landing to load and unload miners, I find this area cited to be a shaft landing.

The next issue to be considered is the argument by respondent that safety of miners in the landing as described by the inspector in the citation he issued is not the hazard comtemplated by the standard alleged to be violated. The inspector described how miners could slip and fall through the wooden barricades placed across the opening and fall in the shaft a distance of 2000 feet. The standard contemplates substantial safety gates so that material will not go through them. It does not mention miners falling into the shaft. The inspector in his description of the hazard does not mention the risk of materials going through the gates into the shaft. In his testimony at the hearing the inspector stated that the hazard here was of a miner slipping on the wet surface and falling through the boards installed across the opening. He did not testify as to materials falling through the gate into the shaft.

In light of the foregoing, I find that the Secretary has failed to prove that the respondent violated standard 57.19-100 in this case. The clear wording of the standard is directed towards a hazard of constructing substantial gates to prevent material from falling into the shaft. See United Nuclear Homestake Partners, 2 FMSHRC 24891 (September, 1980) (ALJ) Also Magma Copper Company, 3 FMSHRC 584 (February 1981) (ALJ). There is no indication that such a gate is to be installed for the purpose of also preventing a miner from falling in the shaft. Even assuming, however, that the gate would also serve this purpose, that is not the hazard described in the standard. This raises the question of how broad an interpretation can be given to the regulations by the adjudicator. In the case of Sunshine Mining Co., 1 FMSHRC 1535, (October 1979)(ALJ), Judge Koutras considered a similar set of facts and reached the conclusion that standard 57.19-100 applies to the installation of gates to prevent materials from falling into the shaft but that the wording of the standard does not prescribe protection to prevent miners from falling. Judge Koutras stated as follows:

> It seems to me that if MSHA desires to protect miners from falling into a shaft at any such mine locations, it should vigorously enforce the existing safety belt and line standard ... And, if MSHA desires to prevent both men and materials at the skip and loading stations or pockets from falling into mine shafts, it should promulgate a clear and concise safety standard covering precisely that situation.

I concur with this conclusion and find from the facts and circumstances presented in this case that citation No. 329888 should be vacated for the reason that the Secretary has not proven by a preponderance of the evidence a violation thereof.

CONCLUSIONS OF LAW

Pursuant to the findings in this matter, it is concluded that:

(1) The Commission has jurisdiction to decide this matter.

(2) The area containing the water tank and junction boxes at the 5300 foot level in shaft six is a shaft landing in the respondent's mine.

(3) The hazard described by the mine inspector in his testimony and also in citation no. 329888 at the shaft landing at the 5300 level in shaft six did not constitute a violation of standard 57.19-100.

(4) Citation No. 329888 should be vacated.

ORDER

Based on the foregoing findings of fact and conclusions of law, I enter the following:

1. Docket No. CENT 80-416-M:

Motion of respondent to withdraw its notice of contest is APPROVED and case No. CENT 80-416-M is DISMISSED.

2. Docket No. CENT 81-108-M:

Post hearing motion by the Secretary to vacate the following citations is APPROVED and Citation Nos. 567059, 567060, 567061, 567062, 567063, 567064 and 567065 are VACATED.

Further, based upon the above findings of fact and conclusions of law Citation No. 329888 is VACATED.

3. Docket No. CENT 81-109-M:

Post hearing motion by the Secretary to vacate Citation No. 567066 is APPROVED and Citation No. 567066 is VACATED.

Virgil E. Vail
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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APR 15 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding
	:	Docket Nos. / Assessment Control Nos.
v.	:	KENT 82-94 15-06778-03011 KENT 82-95 15-06778-03012 KENT 82-96 15-06778-03013
ALLIANCE OF PUCKETT COAL COMPANY, INC., Respondent	:	Rice Harlan Mine

DECISION APPROVING SETTLEMENT

Appearances: Darryl A. Stewart, Esq., Office of the Solicitor, United States Department of Labor; Carson Shepherd, General Superintendent, RB Coal Company, Pathfork, Kentucky.

Before: Administrative Law Judge Steffey

Pursuant to a notice of hearing issued February 9, 1983, as amended March 4, 1983, a hearing was held in the above-entitled proceeding on March 15, 1983, in Barbourville, Kentucky, under section 105(d), 30 U.S.C. § 815(d), of the Federal Mine Safety and Health Act of 1977.

Evidence was submitted at the hearing with respect to one alleged violation of the mandatory health and safety standards. I found that a violation had occurred and assessed a penalty of $25.00 based on the evidence introduced by both petitioner and respondent (Tr. 5-35). Thereafter the parties negotiated a settlement under which respondent agreed to pay reduced penalties amounting to $1,957 instead of the penalties of $3,633 proposed by the Assessment Office.

Section 110(i) of the Act lists six criteria which are required to be considered in assessing civil penalties. Two of those criteria, the size of respondent's business and whether the payment of penalties would cause respondent to discontinue in business, are the primary factors which support acceptance of the parties' settlement agreement. Respondent was represented at the hearing by Mr. Carson Shepherd, who is general superintendent of RB Coal Company. Mr. Shepherd testified that the respondent in this proceeding, Alliance of Puckett Coal Company, is a contract operator owned by RB Coal Company. The facilities operated by RB Coal Company consist of three mines, a washing or cleaning plant, and a raw coal tipple. At the time of the hearing one of the mines had been shut down for 3 weeks, another one had been closed for 6 months, and the third one was working only 1 day each week. The small amount of coal being sold is on the basis of a spot market and RB Coal Company is "just trying to survive right now" (Tr. 44).

The respondent in this proceeding began operating the Rice Harlan Mine in September 1981 and the coal seam ranges from 2 to 36 inches in height (Tr. 23-24). The low range of 2 inches occurs when respondent encounters faults comprised of rock which has to be extracted at high cost until an increased thickness of the coal seam is exposed. Even when conditions were good and coal was being produced on two working shifts, the mine produced only 100 tons of coal per shift (Tr. 28; 32).

Exhibit No. 1 was introduced by counsel for the Secretary of Labor for the purpose of showing respondent's history of previous violations (Tr. 4). Normally the Secretary shows a respondent's history of previous violations for the 24-month period preceding the occurrence of the violations involved in a given proceeding. Respondent, however, did not begin to operate the Rice Harlan Mine here involved until September 1981 and the earliest violations in this proceeding were not cited until December 1981. In such circumstances, Exhibit 1 could not list violations occurring 24 months prior to December 1981. Exhibit 1, therefore, simply lists the same 34 violations for which penalties are sought to be assessed in this consolidated proceeding. In light of the facts described above, I find that respondent has no history of previous violations to be considered in deriving penalties for the violations alleged in this proceeding.

In determining the proposed penalties under the penalty formula described in 30 C.F.R. 100.3, the Assessment Office did not assign any penalty points under the criterion of history of previous violations as to the alleged violations involved in Docket Nos. KENT 82-94 and KENT 82-95. Although the Assessment Office assigned 15 penalty points under the criterion of history of previous violations in determining the penalties proposed for the six violations involved in Docket No. KENT 82-96, that assignment of points was done under the old penalty formula effective prior to May 21, 1982, which included in the prior history any violations for which penalties had been proposed by the Assessment Office, whereas the current formula includes in the prior history only those violations which have been paid or finally adjudicated. None of the violations listed in Exhibit 1 in this proceeding have been paid or finally adjudicated. In such circumstances, I believe that it is inappropriate to attribute any portion of the penalties determined in this proceeding to the criterion of history of previous violations.

As to the criterion of whether respondent demonstrated a good-faith effort to achieve rapid compliance, the Assessment Office found that all of the violations were abated within the time provided for by the inspector, or within the "normal" period described in section 100.3(f) of the previously effective penalty formula, with two exceptions. The first exception to normal good-faith abatement occurred with respect to a violation alleged in Docket No. KENT 82-94 when the inspector issued Withdrawal Order No. 994723 because respondent failed to abate Citation No. 1100507 within the time given by the inspector. In that case, the Assessment Office assigned 10 additional points for respondent's failure to abate in a timely manner and the parties' settlement agreement does not propose any reduction in the Assessment Office's proposed penalty of $325 for the violation of section 75.400 charged in Citation No. 1100507.

The other exception to "normal" good-faith abatement occurred in connection with the proposal for assessment of civil penalty filed in Docket No. KENT 82-95 in which a penalty is sought for the violation of section 75.301 alleged in Citation No. 994729. In that case, the Assessment Office reduced by two the penalty points otherwise assignable under the other five criteria because respondent had abated the alleged violation within a much shorter period than had been allowed by the inspector. The parties' settlement agreement reduces the proposed penalty for the violation of section 75.301 alleged in Citation No. 994729 to $25 from the penalty of $90 proposed by the Assessment Office for reasons other than good-faith abatement. In such circumstances, I find that no penalty assessed in this proceeding under the other five criteria should be further reduced or increased under the criterion of respondent's good-faith effort to achieve compliance because the only two variances from "normal" abatement were taken into consideration by the Assessment Office when it reached the proposed penalties which are being evaluated in this proceeding.

The remaining two criteria of gravity and negligence will hereinafter be examined in a brief evaluation of the specific violations alleged in this proceeding.

Docket No. KENT 82-94

The proposal for assessment of civil penalty filed in Docket No. KENT 82-94 seeks assessment of penalties for 20 alleged violations of the mandatory health and safety standards. Six of the 20 citations involved alleged violations for failure to clean up loose coal and coal dust or apply adequate amounts of rock dust, five of the 20 citations alleged various types of failures to ventilate properly, four citations alleged failure to record various kinds of inspections of equipment or hazardous conditions, one citation alleged failure to install adequate roof supports, one citation alleged failure to ground equipment, one citation alleged failure to guard a tailpiece roller, one citation alleged failure to install a fire-warning device, and one citation alleged failure to maintain a starting box in a permissible condition.

The Assessment Office proposed penalties totaling $1,906 for all 20 violations, whereas the parties agreed to a settlement amount of $1,077. Counsel for the Secretary of Labor moved that the proposal for assessment of civil penalty be dismissed as to the violation of section 75.1704-2(e) alleged in Citation No. 1212377 because he believed that the wrong section of the regulations had been cited. The violation was for respondent's failure to record the results of fire drills in an approved book. The Secretary's counsel correctly concluded that section 75.1704-2(e) does not require that the results of such drills be recorded in an approved book. Therefore, the motion to dismiss with respect to the violation alleged in Citation No. 1212377 will hereinafter be granted. The Assessment Office assigned an appropriate number of penalty points for each alleged violation under the criteria of gravity and negligence.

As hereinbefore indicated, the parties did not propose any reduction in the penalty of $325 proposed for the violation of section 75.400 alleged

in Citation No. 1100507 because the relatively large assessment in that instance resulted from respondent's failure to abate the alleged violation within the time allowed by the inspector who issued a withdrawal order for what he considered to be a lack of a good-faith effort to achieve rapid compliance. The parties' settlement reductions are justified on the basis of respondent's evidence showing its lack of coal orders and the fact that the mine operates for only 1 day each week.

Docket No. KENT 82-95

The proposal for assessment of civil penalty filed in Docket No. KENT 82-95 seeks assessment of penalties for eight alleged violations of the mandatory health and safety standards. The Assessment Office proposed penalties totaling $468 for the eight violations, whereas the parties have agreed to a settlement total of $285. Each of the eight alleged violations involves a different mandatory health or safety standard. One of the citations alleged a failure to take a respirable dust sample, one citation alleged a lack of adequate ventilation at the last open crosscut, one citation alleged a failure to record preshift examinations in an approved book, one citation alleged a failure to apply an adequate amount of rock dust, one citation alleged a failure to hang communication wires on insulators, one citation alleged a failure to install a water line for a distance of 400 feet, one citation alleged a failure to install a sequence switch on the conveyor belt, and one violation alleged a failure to guard a tail roller.

Both parties presented evidence with respect to the violation of section 70.208(a) alleged in Citation No. 9934995 prior to the time they reached their settlement agreement. After the parties had completed their presentations with respect to the violation of section 70.208(a), I found that a violation of section 70.208(a) had occurred and I assessed a penalty of $25.00 based on findings that the violation was nonserious, that respondent operated a small mine, and that the violation was associated with ordinary negligence. I also took into consideration the fact that respondent had hired a new employee whose duties include taking samples of respirable dust at the required intervals. The findings as to respondent's size and whether the payment of penalties would cause it to discontinue in business have already been discussed and support my assessment of a penalty of $25 for the violation of section 70.208(a) alleged in Citation No. 9934995.

The Assessment Office proposed two penalties of $72 each for the violation of section 75.1100-2(b) alleged in Citation No. 994726 and for the violation of section 75.1102 alleged in Citation No. 994731. The parties' settlement agreement does not reduce either of the $72 penalties. The Assessment Office proposed a penalty of $26 for the violation of section 75.516-2(a) alleged in Citation No. 994727 and the parties' settlement agreement does not provide for a reduction in that penalty either. The Assessment Office assigned an appropriate number of penalty points under the criteria of gravity and negligence. As to the remaining four alleged violations, the parties agreed to reductions of about 50 to 60 percent. The reductions are justified by respondent's small size and the difficulties it is encountering in selling enough coal to remain in business.

Docket No. KENT 82-96

The proposal for assessment of civil penalty filed in Docket No. KENT 82-96 seeks assessment of penalties for six violations of the mandatory health and safety standards. Two of the citations alleged violations for respondent's failure to reset timbers which had been knocked down for 700 and 1,200 feet, respectively, in two different entries, one citation alleged a violation for respondent's failure to install permanent stoppings, as opposed to temporary stoppings made of brattice cloth, between the return and intake aircourses in the third crosscut outby the working faces, one citation alleged a violation for respondent's failure to maintain a scoop in a permissible condition, one citation alleged a violation for failure to install an automatic fire-warning device, and one citation alleged a violation for failure of a section foreman to provide himself with a self-rescue device. The Assessment Office proposed penalties totaling $1,259 for all six violations, whereas the parties have agreed to settlement penalties totaling $595.

As hereinbefore indicated, the Assessment Office proposed relatively small penalties in connection with the violations alleged in Docket Nos. KENT 82-94 and KENT 82-95. The primary reason for the moderate penalties proposed in Docket Nos. KENT 82-94 and KENT 82-95 is that the Assessment Office assigned no penalty points at all in those two dockets under the criterion of respondent's history of previous violations. On the other hand, the penalties proposed by the Assessment Office in Docket No. KENT 82-96 are based on assignment of 15 penalty points under the criterion of respondent's history of previous violations pursuant to section 100.3(c) of the penalty formula which was in effect prior to May 21, 1982. The sole basis for assigning those 15 penalty points is that the inspector cited more than 1.7 violations during an inspection day. The penalty formula in use prior to May 21, 1982, relied on penalties proposed for any violations which had been written during the 24-month period preceding the violation under consideration by the Assessment Office. The penalty formula currently in use bases the assignment of penalty points for an operator's history of previous violations only on violations for which penalties have been paid or fully adjudicated. Exhibit 1 in this proceeding shows that none of the penalties proposed for respondent's alleged violations have been paid or fully adjudicated. Therefore, I believe that the penalties proposed by the Assessment Office in Docket No. KENT 82-96 are unwarrantably high because of the Assessment Office's assignment of 15 penalty points under the criterion of history of previous violations. If 15 points were to be subtracted from the total penalty points used by the Assessment Office in deriving the penalties proposed for the six alleged violations at issue in Docket No. KENT 82-96, all of the penalties proposed by the Assessment Office would be reduced considerably below the amounts which respondent has agreed to pay pursuant to the parties' settlement agreement without any adjustment being necessary with respect to assignment of penalty points under the criteria of negligence and gravity.

When consideration is given to respondent's present difficulties in remaining in business, the reductions agreed upon by the parties are justified. When those reduced penalties are additionally considered in light of

the Assessment Office's above-described assignment of 15 points under the criterion of history of previous violations, it is quite apparent that the reductions agreed upon are clearly justified under the six criteria hereinbefore considered.

WHEREFORE, it is ordered:

(A) The motion to dismiss made by counsel for the Secretary of Labor with respect to the violation of section 75.1704-2(e) alleged in Citation No. 1212377 dated December 7, 1981, is granted and the proposal for assessment of civil penalty filed in Docket No. KENT 82-94 is dismissed to the extent that it seeks assessment of a civil penalty for the violation of section 75.1704-2(e) alleged in Citation No. 1212377 dated December 7, 1981.

(B) The motion for approval of settlement made by counsel for the Secretary of Labor at the hearing held in this proceeding on March 15, 1983, is granted and the parties' settlement agreement described at transcript pages 36 through 43 is approved.

(C) Pursuant to the parties' settlement agreement and the assessment of $25 made by me on the basis of evidence presented by the parties at the hearing, respondent shall, within 30 days from the date of this decision, pay civil penalties totaling $1,957.00 which are allocated to the respective alleged violations as follows:

Docket No. KENT 82-94

Citation No. 1212377 12/7/81 § 75.1704-2(e) ..(Dismissed)...	$ 0.00
Citation No. 1212378 12/7/81 § 75.512	20.00
Citation No. 1212379 12/7/81 § 75.507	20.00
Citation No. 1212380 12/7/81 § 75.703	20.00
Citation No. 1099706 12/9/81 § 75.400	100.00
Citation No. 1099707 12/9/81 § 75.400	40.00
Citation No. 1099708 12/9/81 § 75.1722	30.00
Citation No. 1099709 12/10/81 § 75.326	60.00
Citation No. 1099710 12/10/81 § 75.329-1	20.00
Citation No. 1099801 12/15/81 § 75.400	42.00
Citation No. 1099802 12/15/81 § 75.503	20.00
Citation No. 1099803 12/15/81 § 75.202	42.00
Citation No. 1099805 12/15/81 § 75.1103	98.00
Citation No. 1099807 12/15/81 § 75.326	30.00
Citation No. 1099713 12/17/81 § 75.403	50.00
Citation No. 1099714 12/17/81 § 75.403	100.00
Citation No. 1100507 1/12/82 § 75.400	325.00
Citation No. 1100500 1/12/82 § 75.300	20.00
Citation No. 1100509 1/12/82 § 75.512	20.00
Citation No. 2200520 1/12/82 § 75.1704-2(c)(1)	20.00
Total Settlement Penalties in Docket No. KENT 82-94	$1,077.00

Docket No. KENT 82-95

Citation No. 1100511 1/12/82 § 75.303	$ 20.00
Citation No. 994726 1/20/82 § 75.1100-2(b)	72.00
Citation No. 994727 1/20/82 § 75.516-2(a)	26.00
Citation No. 994728 1/20/82 § 75.1722	20.00
Citation No. 994729 1/20/82 § 75.301	25.00
Citation No. 994731 1/20/82 § 75.1102	72.00
Citation No. 994732 1/21/82 § 75.403	25.00
Citation No. 9934995 2/17/82 § 70.208(a) (Contested)	25.00
Total Settlement and Contested Penalties in Docket No. KENT 82-95	$ 285.00

Docket No. KENT 82-96

Citation No. 994721 1/14/82 § 75.503	$ 40.00
Citation No. 994722 1/14/82 § 75.1103	60.00
Citation No. 1100516 1/14/82 § 75.202	175.00
Citation No. 1100518 1/14/82 § 75.316	125.00
Citation No. 1100519 1/14/82 § 75.202	175.00
Citation No. 1100520 1/14/82 § 75.1714	20.00
Total Settlement Penalties in Docket No. KENT 82-96	$ 595.00

Total Settlement and Contested Penalties in This Proceeding	$1,957.00

Richard C. Steffey

Richard C. Steffey
Administrative Law Judge
(Phone: 703-756-6225)

Distribution:

Darryl A. Stewart, Esq., Office of the Solicitor, U. S. Department of Labor, Room 280, U.S. Courthouse, 801 Broadway, Nashville, TN 37203 (Certified Mail)

Alliance of Puckett Coal Company, Inc., Attention: Anita Day, Safety Director, General Delivery, Pathfork, KY 40863 (Certified Mail)

Carson Shepherd, General Superintendent, RB Coal Company, General Delivery, Pathfork, KY 40863 (Certified Mail)

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
2 SKYLINE, 10th FLOOR
5203 LEESBURG PIKE
FALLS CHURCH, VIRGINIA 22041
(703) 756-6210/11/12

APR 18 1983

CARL AMBURGEY, Complainant	:	Complaint of Discrimination
	:	
	:	Docket No. KENT 82-141-D
v.	:	
	:	
BRIGHT COAL COMPANY, Respondent	:	

DECISION

Appearances: Carl Amburgey, Whitesburg, Kentucky, pro se; Ronald G. Polly, Esquire, Whitesburg, Kentucky, for the respondent.

Before: Judge Koutras

Statement of the Proceedings

This proceeding concerns a discrimination complaint filed by the complainant with the Commission pursuant to section 105(c)(3) of the Federal Mine Safety and Health Act of 1977. Complainant Carl Amburgey asserts that he was discharged from his employment with the respondent because he refused to drive a scoop which he believed was unsafe because it would not steer. The complaint was filed pro se after Mr. Amburgey was advised by the Secretary of Labor, Mine Safety and Health Administration, (hereinafter MSHA), that its investigation of his complaint disclosed no discrimination against him by the respondent.

By notice of hearing duly served on the parties, a hearing was conducted in this matter in Pikeville, Kentucky, on February 23, 1983, and the parties appeared and participated fully therein. Testimony and evidence was taken on the record, and the parties made oral arguments on the record in support of their respective positions. They waived the filing of any post-hearing proposed findings, conclusions, and briefs.

Issues

The critical issue presented in this case is whether Mr. Amburgey's discharge was prompted by protected activity under section 105(c)(1) of the Act. Specifically, the crux of the case is whether Mr. Amburgey's refusal to continue operating a scoop because he believed it was unsafe due to an alleged problem with the steering is protected activity under the Act. Additional issues raised in this case are identified and discussed in the course of the decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 301 et seq.

2. Sections 105(c)(1), (2) and (3) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815(c)(1), (2) and (3).

3. Commission Rules, 29 CFR 2700.1, et seq.

Discussion

The record in this case reflects that at the time of the discharge on December 30, 1981, the complainant was employed as a scoop operator at an hourly wage of $9.00. The Bright Number 9 Mine is a nonunion mine, and the company fringe benefits are limited to payment of employee hospitalization benefits. The record also reflects that the complainant worked at the mine in question for approximately three months up to the date of discharge, but prior to that time worked at other mines operated by the respondent, and that his total period of employment prior to his discharge was eight months. The complainant advised that since his discharge, he has been continually employed with another coal mine operator, and has been so employed since February 1982 (Tr. 2-5; 39).

Complainant's testimony and evidence

Complainant Carl Amburgey testified that on the morning of December 30, 1981 while operating a scoop on the section at approximately 7:15 a.m., he had difficulty manuevering his scoop into a cut of coal because "the scoop just wouldn't steer into the cut", and he informed assistant underground foreman James Noble of that fact. Mr. Nobel responded "you couldn't drive it if it was a brand new car", and ordered him out of the mine by telling him "well, just go to the outside. We don't need you nohow". Mr. Amburgey then left the section and told general mine foreman Jack Collins about the incident (Tr. 13-14). Mr. Collins asked him if he had quit his job, and Mr. Amburgey stated that he did not respond. At approximately 9:30 a.m., the mine fan went off and all the miners were sent home. He then called mine owner Jim Hogg and asked for his job back. Mr. Hogg informed him that Mr. Collins told him (Hogg) that he caught Mr. Amburgey and fellow miner Clifford Gilbert sitting at the section loading point not doing their job, and as a result of this "lie", Mr. Amburgey filed his discrimination complaint with MSHA (Tr. 14).

Mr. Amburgey testified that he took Mr. Noble's instruction to "get to the outside" to mean that he had been fired, but he did not know whether Mr. Noble had the authority to fire him. Mr. Amburgey confirmed that he did not answer Mr. Collin when he asked him whether he had quit, and had the mine not been idled he would have tried to find a way home (Tr. 16). Mr. Amburgey also confirmed that when he called Mr. Hogg, he (Hogg) informed him that he was told that Mr. Collins was the person who had fired him (Tr. 17).

Mr. Amburgey confirmed that he had operated the scoop in question during the time he was employed at the Bright No. 9 Mine, and he filed his complaint because he believed his discharge was illegal. He also confirmed that he received unemployment benefits until February 1982 when he obtained other employment (Tr. 18).

On cross-examination, Mr. Amburgey confirmed that there were three scoops on the section where he worked, and he operated them at different intervals. As to his operation of the particular scoop which he claims had a steering problem, he could not state how often he operated it prior to December 30, but indicated that it was "once or twice" (Tr. 20). He stated that he had encountered steering problems with the scoop two or three weeks prior to that date, but the problem was taken care of (Tr. 22). He confirmed that an MSHA inspector was at the mine on December 30, but he did not check the scoop in question (Tr. 24).

Mr. Amburgey testified that the scoop he was operating on December 30, would not steer in the corner where a shot had just been made in a fresh break, and he was concerned that it might strike the rib, curtain, or people. Mr. Noble was located right at the rib where he attempted to steer around the corner, and Mr. Amburgey stated that he mentioned nothing about safety, but simply told Mr. Noble that he couldn't steer the machine. After some words between the two, Mr. Amburgey got off the scoop and told Mr. Noble "well, you drive it, then" (Tr. 26).

Mr. Amburgey confirmed that he had never known Mr. Noble to fire anyone, and when he told him "to go outside" he did not specifically state that he had been fired (Tr. 28). When he encountered Mr. Collins on the surface, he told him that Mr. Noble had sent him outside and he did not tell Mr. Collins that the scoop was unsafe and would not steer (Tr. 29). Mr. Amburgey confirmed that he had no previous trouble steering any of the scoops on the section (Tr. 31). He also confirmed that Mr. Collins hired him to work for the respondent, and has known him for a number of years (Tr. 36-37). He also confirmed that he was "going to forget about the whole episode" but "got mad" when he believed that Mr. Collins "lied" to Mr. Hogg about the circumstances of his leaving respondent's employ (Tr. 38).

In response to certain bench questions, Mr. Amburgey respondend as follows (Tr. 41-42):

> Q. When you say you were having trouble steering this scoop, was it because of the way the coal was cut or was something mechanically wrong with the scoop?
>
> A. It just wouldn't steer like it should, you know. No matter where you would point it, it wouldn't steer like it was supposed to steer.

Q. You said it had had some problems with the steering on it before?

A. Yes.

Q. And it was taken care of?

A. They worked on it, yes.

Q. What specifically was wrong with the scoop?

A. They put steering caps and stuff on it. That's all I know.

Q. You had an MSHA inspector there that day?

A. Yes.

Q. After Mr. Noble sent you out of the mine did you ever think about getting the inspector over there to take a look at the scoop?

A. No, I didn't.

Q. Why not?

A. When he told me to go to the outside, that's when I went to the outside.

Q. When he tells you to go outside, you went outside. And when you went outside you said nothing to Mr. Collins?

A. I just told him that Noble told me to come outside.

Q. Why didn't you tell Mr. Collins why? Why didn't you tell Mr. Collins you were having trouble with the scoop? I assume he's the superintendent. He would go down there and check it out, wouldn't he?

A. I guess he would.

Q. But he wouldn't do that unless you told him, would he?

A. No, I don't guess.

Q. Why didn't you tell him?

A. I don't know. I was just upset. I told him that Noble told me to go outside, that he didn't need me nohow.

Q. You claim that Mr. Noble said some words to the effect that you couldn't drive it if it were brand new and he didn't need you anyway. This leads me to believe that you and Mr. Noble didn't hit it off too well. It is kind of unusual for two people to get along at work, and a worker and a supervisor to have words over a steering and him telling you, "Well, you dumb so-and-so, you couldn't operate that thing if it was new, and get out. I don't need you." That leads me to believe that you and Mr. Noble had been going at it for quite a while. Is that right?

A. Every once in a while he would call me a dumb ass.

Q. Over what?

A. I don't know.

Q. Did he make it a habit of calling his workers names like that?

A. He would act a fool and go on with them all the time, but every once in a while he would get mad and call them a name or something.

Q. Was this in jest?

A. I don't know.

Q. Or was this shop talk?

A. He would just get mad every once in a while and call you a dumb ass or something.

In response to further bench questions, Mr. Amburgey admitted that a week or so prior to his claimed discharge he operated a scoop on the section with an inoperative front light for practically the entire shift, that he knew the light was out, but said nothing about it because "something like that, I usually don't pay no attention to it". At the end of the shift as he was driving along the belt line along a curtain, he nearly struck Mr. Noble and an MSHA inspector. When asked about the light at the time, he told Mr. Noble that it had been out all day, and the next morning Mr. Noble "got mad" at him and "cursed me out" for admitting the light had been out. Mr. Amburgey did not know whether the inspector issued a citation for the defective light, and he did not tag the machine out (Tr. 43-48).

With regard to the scoop that he claimed had a steering problem, Mr. Amburgey confirmed that he had not experienced prior steering problems with the machine before December 30, and he confirmed that he did not check the machine before he operated it that day, but "guessed" that a repairman did (Tr. 48, 50).

Testimony and evidence adduced by the respondent

Jack Collins, mine superintendent, testified that he has known Mr. Amburgey for 10 to 12 years and that at one time he was married to one of his relatives. He confirmed that he had no previous problems with Mr. Amburgey, and he stated that all underground equipment is pre-shifted by the foreman one hour before the actual start of any shift. He stated that Mr. Amburgey was originally hired as a timber man and "extra inside man" doing odd jobs. After expressing a desire to be a scoop driver, Mr. Collins trained him for this job and Mr. Amburgey began operating the scoop "a couple of weeks" after the opening of the Number 9 mine. Prior to this time, while Mr. Amburgey told him he had prior experience as a scoop operator, his experience was limited to tramming it and he had no prior coal production experience with a scoop (Tr. 54).

Mr. Collins testified that Mr. Amburgey's tramming scoop experience consisted in pulling a load of coal tied to a "ram car" without a bucket, and he instructed the foreman to let him learn the actual coal loading process using a scoop with a bucket, which required the actual knowledge to load coal out, and that this was a more difficult task (Tr. 56). Mr. Collins stated that five scoops were available on the section, and that each driver had a particular one which he operated. He confirmed that he found out about Mr. Amburgey knowingly operating a scoop with a defective light after the fact, and had he been advised the day it happened, he would have discharged Mr. Amburgey. He did not do so because Mr. Amburgey had already gone underground the day after the incident to work, and one or two weeks had passed, but he did "chew him out" over the incident and told him never to drive any equipment underground without lights on it (Tr. 59).

Mr. Collins stated that on December 30, 1981, when Mr. Noble sent Mr. Amburgey out of the mine, he spoke with Mr. Amburgey in the mine office, and when he asked him what the problem was Mr. Amburgey replied "I've quit. I can't get along with that foreman (Noble) up there" (Tr. 61). Mr. Collins testified as follows concerning this conversation (Tr. 61-62):

> A. I asked him what he quit for and he said, "I can't get along with that foreman up there." He said, "I can't drive a scoop to satisfy him." I said, "Carl, I've got a job open on the tail piece if you want it, shoveling on the tail piece up there." He said, "No, I've quit. I can't get along with him." I said, "Now, you might ought to think this over, Carl." I said, "Right now a job is hard to find, and when you go off this hill and I hire another man in your place I can't take you back." He said, "I've quit." I said, "Well, that's up to you."

Mr. Collins testified that after Mr. Amburgey left the mine, he called him that same evening seeking his job back, but he had hired someone else. Mr. Collins denied ever asking Mr. Amburgey to leave and

never told him that he was fired or discharged (Tr. 64). He confirmed that Mr. Amburgey never mentioned to him anything about any unsafe condition on the scoop or that he was having difficulty steering it. Mr. Collins stated that he first learned about this situation when Mr. Noble came out of the mine the day Mr. Amburgey left, and he testified as follows with regard to the incident in question (Tr. 65-67):

> Q. When Noble came outside, what did he tell you?
>
> A. He told me that Carl was up there trying to load that scoops, and he had two (2) scoops behind him held up; holding up production. He said he told Carl to move his scoop back on this side and load over here and let them other two scoops go on and get in that coal, because he was holding them up. The pin man was held up; the shooting man was held up; he had a whole crew held up there trying to load that scoop. He said Carl told him, "I can't drive it to suit you. Drive it yourself."
>
> Q. Well, did Noble say anything about why he was holding up everybody and why he couldn't drive the scoop?
>
> A. He just told me that Carl wasn't going to make a scoop operator. He said he was just holding up production.
>
> Q. Did he say anything about the steering; that it wouldn't steer?
>
> A. No.
>
> Q. Did he say anything to you--did Noble say anything to you that Carl Amburgey said that it wouldn't steer?
>
> A. No. Amburgey told Noble to drive it himself, and he did drive it. He drove it the rest of the shift himself. If there had been something wrong with the steering he couldn't have drove it.
>
> Q. Did you talk to Jim Hogg about Carl Amburgey?
>
> A. No.
>
> Q. You never did?
>
> A. I never did.

Q. You heard Amburgey testify that he called Jim Hogg and Jim Hogg told him that you had told Jim Hogg that you found Clifford Gilbert and Carl Amburgey sitting at the loading point not working and that you sent them outside?

A. I heard him testify that, yes.

Q. Did that occur? Did you tell Jim Hogg that?

A. No. I didn't even talk to Jim Hogg, period, about him. He never questions what I do. If I hire or fire or dismiss or do anything I want to, I am in complete charge of the mine and what comes, it has to come through me before it goes anywhere. No man can be hired or fired unless it comes through me only, you know.

Q. Did Noble have the authority to fire Carl Amburgey that day?

A. No.

Q. Did you mention that to Carl Amburgey? Did he know--did he have any reason to know that?

A. I never told Carl that Noble couldn't fire him. The word "Fire" was never brought up. I had no reason to tell him that. The word "Fire" was never brought up in our conversation; not Carl's and mine.

During a bench colloquy, Mr. Amburgey denied that he told Mr. Collins he had quit, and his testimony on this point is as follows (Tr. 72):

MR. AMBURGEY: I never did come right out and say I'd quit, no.

JUDGE KOUTRAS: You say you never came right out and said it. Did you say anything that gave Mr. Collins the impression that you were quitting?

MR. AMBURGEY: I just told him that Noble had sent me to the outside, you know.

Regarding his knowledge of any defective steering on the scoop in question, Mr. Collins testified as follows (Tr. 75-78):

Q. After you talked to Mr. Amburgey, you never went back underground to check the scoop out, or anything, did you?

A. The scoops come outside.

Q. They come out?

A. Yes.

Q. Did you ever check the scoop out after Mr. Amburgey had left, or after that day, to determine whether or not there was actually anything wrong with the steering?

A. I was never aware that there was anything wrong with it. I didn't check it. I was never aware that there was something wrong.

Q. When did you find out that Mr. Amburgey was having problems with the steering?

A. I never did find out that he was.

Q. You must have found out when he filed the complaint in this case?

A. Oh, yes. I knew about it then, but that was probably a month or so later.

Q. Was that the first time you found out?

A. Yes, that there was something wrong with the scoop. I was never aware that there was because the drivers kept on driving the scoops and pulling cars.

Q. That is what I am driving at. After Mr. Amburgey left, he said nothing to you about the scoop and him having problems with it, or anything?

A. No.

Q. All he told you was that Noble sent him outside the mine?

A. He said--no, he didn't even tell me that Noble sent him out. He just told me, "I've quit. I can't get alont with that foreman."

Q. After he left that day--December 30, 1981 would have been a Wednesday, of course, on my calendar. Okay.

A. Yes.

Q. You say he called you back that night trying to get his job back?

A. That's right.

Q. That you had already hired somebody?

A. I hired a man that day.

Q. So, the next Thursday when you went back to the mine was that same scoop that he had worked on the previous day used in the mine?

A. I don't really know. You see, I had five (5).

Q. At any time after December 30 up until the time that this complaint was filed by Mr. Amburgey did you ever have occasion as mine superintendent to have someone inspect that scoop for steering or anything like that?

A. Yes. My repairman goes over the scoops every day.

Q. Did anyone ever bring to your attention the fact that he was having problems with the steering?

A. No.

Q. Was that scoop ever cited by an MSHA inspector after you left?

A. Not on the steering.

Q. Not on the steering?

A. Not on the steering.

Q. The only time it was cited was for that light. Was this the same scoop that we are talking about where the light was out?

A. I really don't know if it was the same scoop he was on or not.

Q. Did you talk to Mr. Noble the next day?

A. Yes.

Q. And he told you essentially what you testified to in response to Mr. Polly's question, that he thought Mr. Amburgey would never make a scoop operator and that he was holding up production, and that sort of thing, and asked him to get out of the way and that Mr. Amburgey told him, "Well, you drive it," and he did the rest of the shift? That was the extent of your conversation?

A. That's right

Q. And Mr. Noble never mentioned anything to you about Mr. Amburgey saying he was having problems with the steering?

A. No. He didn't mention it to me at all.

Q. And your assumption was, since Mr. Noble went ahead and operated it the rest of the shift, that there was nothing wrong with the steering?

A. Evidently.

James E. Noble, underground mine foreman, Bright No. 9 Mine, testified that on the day in question when Mr. Amburgey was operating his scoop he was "gouging the scoop" trying to get into an area, and after attempting to show him how to pull into the area, Mr. Amburgey uttered an obscenity, and he (Noble) sent him out of the section, telling him "Go on to the outside, then. I don't need you" (Tr. 81). At the time Mr. Amburgey was assigned to the mine he was an "extra man", and was used to shoot coal or set timbers. He filled in as a scoop operator when someone missed work, and he had been driving the scoop two months prior to the incident of December 30, 1981 (Tr. 82)/

Mr. Noble stated that he had production troubles with Mr. Amburgey because he was slow, but he "overlooked it hoping he'd get better". Mr. Noble stated that in his attempts to maneuver into the area where he was to load coal out, Mr. Amburgey was "gouging the bucket" and "tearing it up", and after an exchange of words, Mr. Amburgey told him "drive it yourself", and Mr. Noble did in fact complete the work with the same scoop and there was nothing wrong with it. Mr. Noble simply believed that Mr. Amburgey was not a good scoop operator, and Mr. Amburgey said nothing to him about any defective or unsafe steering (Tr. 83-85). Had he mentioned anything to him, he (Noble) would have taken the machine "to the outside" for repairs (Tr. 85).

Mr. Noble confirmed that he had never fired anyone who worked for the respondent, had no such authority, and he stated that if it had to be done he would bring the matter to Mr. Collins' attention (Tr. 87). By sending Mr. Amburgey "to the outside", he meant that he was to see Mr. Collins. Had Mr. Collins seen fit to give Mr. Amburgey other work that day, he could have returned to his section the next day, but that it was up to Mr. Collins to put him back to work (Tr. 89). Mr. Noble confirmed that he loaded five or six loads of coal with the scoop on December 30, after he ordered Mr. Amburgey out of the mine (Tr. 89). He confirmed that by his inability to load the coal with the scoop, Mr. Amburgey had two experienced scoop drivers waiting behind him holding up production, and they were agitated over this (Tr. 90, 92).

Mr. Noble confirmed the incident over the defective front scoop light took place a week or two before December 30, and that he "chewed him out" over the incident because Mr. Amburgey admitted he had operated the car the entire shift with the light out and said nothing to anybody (Tr. 95).

Stanley Caudill, testified that he has worked as a miner for 36 years. He testified that he was at the mine on December 30, 1981, and that his job is to help repair the scoops. After observing two scoops parked outside, he asked Mr. Amburgey "what's the matter", and Mr. Amburgey replied "I've quit". Mr. Caudill then summoned Mr. Collins and he oberheard Mr. Amburgey tell Mr. Collins "Me and Noble can't get along. I'll just quit". Mr. Collins then told Mr. Amburgey to "think twice about it" and offered to put him to work "on the tailpiece". Mr. Amburgey said nothing about any steering problems at that time, and Mr. Caudill did not hear Mr. Collins fire Mr. Amburgey (Tr. 99-100). Mr. Amburgey declined to cross-exam Mr. Caudill or to ask any additional questions (Tr. 101).

Rondell Roark, formerly employed by the respondent, testified that he worked at the No. 9 Mine on December 30, 1981, as a roof bolter operator, and he was present on the section and witnessed the incident over the scoop car. His testimony is as follows (Tr. 103-105):

> A. The best I remember, Carl come up in that place and was trying to clean it up. If he said anything about the steering I did not hear it. I can't remember it. As far as I know, he didn't.
>
> Q. What did you see? Tell the Judge what you saw Carl do.
>
> A. He was trying to clean that place up and James told him to go on to a new cut and let them other two (2) scoops get in there and finish cleaning that up where I could get in there and bolt it. Carl took a load out and he came back. He started to hit the same cut again and James told him, "Go to a fresh cut and let these other fellows do it."
>
> Q. Did you see anything wrong with what he was doing on that cut?
>
> A. No, sir. He weren't running it like an expert, you know, but that would be expected with him just being in training.
>
> Q. Did you know he was just in training?
>
> A. Yes, sir. But James told him to go on to another cut and let the other two (2) experienced scoop drivers get in there and finish clearning that up. Then they got into it and Carl jumped off the scoop and said, "There. You run it." James told him to go outside.

Q. Did you hear the entire conversation between them?

A. Not all of it.

Q. If Carl Amburgey had said something to James Noble that day about the scoop steering not working, something being wrong with the steering, or it being unsafe or dangerous, would you in all likelihood have heard it?

A. Most likely I would have. I wasn't paying much attention. I just set there and I'd wait for them to clean it up. Then I'd go in and bolt it. I didn't pay much attention. Like I said, if he said anything about the steering I don't remember it or I didn't hear it.

Q. If he had said anything about it . . . .

A. If he had, I think I would've heard it. I was setting there beside of him. I don't know. I can't remember. It's been a year.

Q. If that had been the case and if he had said anything about the steering, do you think it would be likely that you would remember it?

A. I don't know. I wasn't paying that much attention. I might have. He wasn't fired. I can say that. James just told him to go outside.

Q. He was not fired?

A. He just told him to go outside.

Q. Would you have took that as him being fired, or you being fired, if you had been told that?

A. No. I'd have went outside. Let me clarify about James. He cursed and hollered and went on back in there, acting crazy all the time. You never know when he was serious and when he wasn't. Most likely, if Carl had just cursed him right back and went on about his business there wouldn't be nothing to it, because we just carried on. Sometimes in there you'd think they was going to fight and they'd just be horse playing.

Q. Did Noble get on the scoop and drive it then?

A. The best I can remember, he did.

Q. Did you see him load coal with it?

A. I can't remember. They were moving on to the next cut and then I went in to bolt it.

Q. Did you ever become aware that there was anything wrong with the steering after that?

A. No, sir, not till here the other day when they said this case was coming up.

Mr. Amburgey declined to cross-examine Mr. Roark or to ask him any additional questions (Tr. 106). Mr. Amburgey was recalled by me and he confirmed that at the time he spoke with Mr. Collins after being sent out of the section by Mr. Noble, he did not say anything to Mr. Collins about any scoop steering problems (Tr. 107). Mr. Amburgey denied that Mr. Collins subsequently told him that he had hired someone else to replace him, and he stated that he took Mr. Noble's directive to "go on outside. I don't need you anymore" to mean that he had been fired. He confirmed that he told Mr. Collins he could not get along with Mr. Noble, and when asked whether he denied telling Mr. Collins that he had quit, he replied "I never did come out and tell him I quit" (Tr. 109).

Mr. Amburgey testified further that he could not recall Mr. Collins offering him other work at the tail piece on December 30, and he confirmed that Mr. Noble had not previously questioned his ability as a scoop driver, nor could he recall Mr. Noble telling him to back the scoop out and go to another cut (Tr. 112). He did confirm that after an exchange of curse words between them, he got off the scoop and told Mr. Noble to drive it, and at that point, Mr. Noble ordered him "to the outside" (Tr. 113). Mr. Amburgey confirmed that he did not know why the scoop would not steer, nor did he know what was wrong with it or whether it was defective (Tr. 114).

Findings and Conclusions

As indicated earlier, the issues in this case are whether Mr. Amburgey's refusal to continue operating a scoop because of his belief that the steering mechanism was somehow defective and unsafe is protected activity under the Act, and whether his asserted discharge for this refusal was proper. Refusal to perform work is protected under section 105(c)(1) of the Act if it results from a good faith belief that the work involves safety hazards, if the belief is a reasonable one, and if the reason for the refusal to work is communicated to the mine operator. Secretary of Labor/Pasula v. Consolidation Coal Co., 2 FMSHRC 2786, 2 BNA MSHC 1001 (1980), rev'd on other grounds, sub nom Consolidation Coal Co. v. Marshall, 663 F.2d 1211 (3d Cir. 1981); Secretary of Labor/Robinette v. United Castle Coal Co., 3 FMSHRC 803, 2 BNA MSHC 1213 (1981); Bradley v. Belva Coal Co., 4 FMSHRC 982 (1982); Secretary of Labor/Dunmire and Estle v. Northern Coal Co., 4 FMSHRC 127 (1982).

One initial question for determination is whether or not Mr. Amburgey was actually discharged on December 30, 1981, or whether he voluntarily quit or abandoned his job. The mine in question is a nonunion mine, and it would appear from the record here that at the pertinent time in question there were no formal grievance or discharge procedures, and it seems clear that no written notice of any kind was given to Mr. Amburgey when he departed the mine on December 30, 1981.

Mr. Collins testified that he has the sole authority to discharge or otherwise discipline miners and that he did not actually fire or discharge Mr. Amburgey, and his testimony is corroborated by Mr. Caudill who overheard a conversation between Mr. Collins and Mr. Amburgey concerning the incident in question. Underground foreman Noble testified that he did not actually tell Mr. Amburgey that he had been fired at the time he ordered him out of the mine, and he also testified that he had no authority to fire anyone. On the other hand, Mr. Amburgey testified that when the foreman ordered him out of the mine, he thought he had been fired. Other witnesses who testified in this case stated that Mr. Amburgey stated that he had quit because he could not get along with foreman Noble. Mr. Amburgey's testimony that he telephoned Mr. Collins on the evening of December 30, 1981, in an attempt to get his job back supports his assertion that he believed he had been fired. Mr. Collins testimony that Mr. Amburgey did in fact call him, and his hiring of another man to replace Mr. Amburgey does lend some support to Mr. Amburgey's belief that he had been fired.

On the basis of all of the credible testimony in this case, I believe it is reasonable to conclude that at the time of the incident in question Mr. Amburgey had reasonable grounds to believe that he had been discharged by the foreman. However, in view of my findings and conclusions which follow below on the question of whether or not his work refusal was protected activity, the question of whether he was fired or actually quit becomes moot.

The record establishes that after Mr. Amburgey was ordered out of the section by the foreman and sent to the surface, he encountered Mr. Collins, and Mr. Collins testified that he offered Mr. Amburgey other work on the tailpiece. This was corroborated by the testimony of Mr. Caudill. Mr. Amburgey denies that he was offered other work, and later that same day the mine was idled because the fan went down and everyone went home, including Mr. Amburgey. At no time did Mr. Amburgey mention anything to Mr. Collins about any defective steering on the scoop machine in question, and at no time did he tell Mr. Collins that he was concerned for his safety.

After careful consideration of all of the testimony in this case, I cannot conclude that Mr. Amburgey has established through any credible testimony or evidence that the scoop car in question was in fact defective and that his refusal to operate it was protected activity. It seems clear to me from all of the testimony in this case, that Mr. Amburgey and foreman Noble had a dispute over Mr. Amburgey's ability to operate the scoop car in question, and that after the dispute escalated into a shouting match between the two, Mr. Amburgey was ordered out of the mine.

Mr. Amburgey conceded that at no time did he advise Mr. Collins that he was having any problems with the steering on the scoop car, and Mr. Noble's credible testimony is that he drove the car without incident after Mr. Amburgey refused to operate it. Mr. Caudill corroborated the fact that Mr. Amburgey never mentioned anything to Mr. Collins about the car being unsafe, and since Mr. Caudill was responsible for maintaining the cars I would think that any unsafe condition of the car would have come to his attention. Further, even though an MSHA inspector was on the property on the day in question, Mr. Amburgey said nothing to him about the alleged defective steering.

Having viewed all of the witnesses on the stand during the course of the hearing, I conclude that Mr. Amburgey's complaint in this case was filed because of a personal dispute with mine management unrelated to any real safety concerns on his part with respect to the scoop car in question. Mr. Amburgey admitted that he filed his initial complaint with MSHA after learning that Mr. Collins had "lied" about the circumstances of his leaving the mine on December 30, 1981.

With regard to Mr. Amburgey's allegation that he was "cursed out" because he would not lie to an MSHA inspector about the light being out on his scoop car, I take note of the fact that this allegation was never made to MSHA as part of his initial complaint, but was stated in his letter of August 19, 1982, to the Commission after MSHA advised him that no discrimination had occurred. At the hearing, respondent's counsel objected to the interjection of this allegation as part of the complaint, and he established that Mr. Amburgey had never served respondent with a copy of the letter (Tr. 6-10).

The record here establishes that the defective scoop light incident took place a week or two prior to December 30, 1981, and Mr. Amburgey admitted that he knowingly drove the car with one light out and had failed to report that condition to mine management. While it is true that Mr. Amburgey was "chewed out" by Mr. Collins and Mr. Noble for not informing management of the defective light, I cannot conclude that there is any credible testimony to support his allegation or inference that mine management "cursed him" or otherwise harassed him for not lying to an MSHA inspector about this incident.

Conclusion and Order

In view of the foregoing findings and conclusions, and after careful consideration of all of the evidence and testimony adduced in this case, I conclude and find that the respondent did not discriminate against Mr. Amburgey, and that his rights under the Act have not been violated. Accordingly, his discrimination complaint IS DISMISSED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 1983

SOUTHERN OHIO COAL COMPANY, Contestant	:	Contest of Citations
	:	Docket No. LAKE 82-93-R
v.	:	Citation No. 1225640; 6/3/82
	:	
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent	:	Docket No. LAKE 82-94-R
	:	Citation No. 1225641; 6/3/82
	:	
	:	Docket No. LAKE 82-95-R
	:	Citation No. 1225867; 6/4/82
v.	:	
	:	Meigs No. 2 Mine
UNITED MINE WORKERS OF AMERICA (UMWA), Intervenor	:	Raccoon No. 3 Mine

DECISIONS

Appearances: D. Michael Miller, Daniel A. Brown, Esqs., Columbus, Ohio, for the Contestant; Edward Fitch, Attorney, U.S. Department of Labor, Arlington, Virginia, for respondent MSHA; David Shreve, Mary Lu Jordan, Esqs., UMWA, Washington, DC, for the Intervenor.

Before: Judge Koutras

Statement of the Proceedings

These consolidated cases arise from similar circumstances regarding "meetings or conferences" arranged by MSHA inspectors and held at the mine sites owned and operated by the Respondent Southern Ohio Coal Company (hereinafter SOCCO). In each of the citations herein contested, the inspector issued citations pursuant to section 104(a) of the Federal Mine Safety and Health Act of 1977, charging SOCCO with violations of section 103(f) of the Act as a result of SOCCO's refusal to compensate the miners' representatives for their time spent at the conferences or meetings. SOCCO concedes that the walkaround representatives were not paid.

Section 103(f), commonly referred to as "the walkaround right", provides as follows:

> Subject to regulations issued by the Secretary, a representative of the operator and a representative authorized by his miners shall be given an opportunity to accompany the Secretary or his authorized representative during the physical inspection of any coal or other mine made pursuant to the provisions of subsection (a), for the purpose of aiding such inspection and to participate in pre- or post-inspection conferences held at the mine. Where there is no authorized miner representative, the Secretary or his authorized representative shall consult with a reasonable number of miners concerning matters of health and safety in such mine. Such representative of miners who is also an employee of the operator shall suffer no loss of pay during the period of his participation in the inspection made under this subsection. To the extent that the Secretary or authorized representative from each party would further aid the inspection, he can permit each party to have an equal number of such additional representatives. However, only one such representative of miners who is an employee of the operator shall be entitled to suffer no loss of pay during the period of such participation under the provisions of this subsection. Compliance with this subsection shall not be a jurisdictional prerequisite to the enforcement of any provision of this Act [emphasis supplied].

Issues

A general issue raised by the UMWA and MSHA is the validity of the Secretary's determination that miners must be paid while attending certain mine site meetings or conferences, held at periodic intervals determined by the inspector, to review citations issued by the inspector. The Secretary has concluded that such meetings are properly categorized as post-inspection conferences under section 103(f) of the Act and that the right of a miner's representative to participate and to receive pay for said participation are co-extensive for any post-inspection conferences held on the mine site.

On the specific facts of the instant cases, and without admitting that a miner representative is entitled to be compensated for attending any post-inspection conference, SOCCO's position is that the meetings held at the mine site were not inspection conferences within the meaning of section 103(f), but were merely assessment conferences held pursuant to the newly promulgated "Part 100" civil penalty assessment regulations. In short, while SOCCO concedes that miner representatives are entitled to compensation under section 103(f) when they accompany inspectors during a physical walkaround inspection of the mine, it does not concede that compensation is mandated by that section for "assessment conferences" held pursuant to Part 100, Title 30, Code of Federal Regulations.

Discussion

In Docket LAKE 82-93-R, the inspector issued Citation No. 1225640, on June 3, 1982, and the condition or practice cited states:

> On May 24, 1982, Frank Goble, representative of the miners, accompanied Myron Beck, MSHA Inspector, during a regular inspection of the mine, which was pertaining to conference and modifications of citations according to new 30 CFR Part 100, civil penalty criteria, and he was not paid for the time he participated in such inspection.

In Docket LAKE 82-94-R, the inspector issued Citation No. 1225641, on June 3, 1982, and the condition or practice cited states:

> On May 24, 1982, Bob Koons, representative of the miners accompanied D. E. McNece, Jr., MSHA Inspector, during a regular inspection of the mine which was pertaining to conference and modification of citations according to new 30 CFR Part 100, civil penalty criteria, and he was not paid for the time he participated in such inspection.

In Docket LAKE 82-95-R, the inspector issued Citation No. 1225867, on June 4, 1982, and the condition or practice cited states:

> On May 24 and 26 Bill Blackburn, representative of the miners traveled with an authorized representative of the Secretary on a regular AAA inspection and was not compensated for his loss of pay for those days.

At the hearing in these cases, testimony and evidence was taken concerning the citations issued in Dockets LAKE 82-93-R and 82-94-R, at SOCCO's Meigs No. 2 Mine. With regard to the citation issued at the Raccoon No. 3 Mine, SOCCO's counsel made a proffer that the testimony regarding the Raccoon Mine No. 3 would be the same as that presented for the Meigs No. 2 Mine, and in its post-hearing brief, at pg. 8, SOOCO's counsel confirms that "the evidence regarding this citation would not be materially different from the evidence concerning the first two" (Tr. 11). MSHA's counsel stated that "no penalty was made for the Raccoon No. 3 Mine citation and it was my understanding that that case was going to be withdrawn" (Tr. 11).

MSHA's responses to certain interrogatories filed in Docket LAKE 82-95-R do confirm that the facts which gave rise to the issuance of the contested citation in that case are similar to those which took place in the other two dockets, and the legal arguments advanced by the parties in all three cases appear to be the same. In order to clarify the matter further, telephone conferences were held by me with counsel for MSHA, SOCCO, and

the UMWA on March 4, 1983, and they confirmed that the facts and legal arguments are similar. However, SOCCO's counsel confirmed that the civil penalty assessed for the citation issued in LAKE 82-95-R, had "been paid by mistake", and SOCCO's position is that it still intends to litigate the issue raised notwithstanding that "mistaken" payment, and that its contest has not been withdrawn. MSHA's counsel could not confirm whether the civil penalty had in fact been paid, and as far as I know, no motions have ever been filed by the parties seeking withdrawal or dismissal of the case. Accordingly, I have included it as part of my decisions in these proceedings.

MSHA's testimony and evidence

MSHA Inspector Dalton E. McNece, testified as to his background, and he confirmed that he went to the Meigs . 2 mine on May 24, 1982, and met with company safety supervisor Carl Curry and representative of the miners Bob Koons. He advised them that he was there for the purpose of a Part 100 conference, and that instead of a regular mine inspection, he would spend the day "conferencing and modifying citations under the new Part 100 which were citations that had previously been issued and had not been conferenced" (Tr. 47).

Mr. NcNece stated that the conference consisted of a discussion of 14 citations, and that Mr. Koons and Mr. Curry participated in the discussion. Mr. NcNece confirmed that he modified each citation, including the factors of negligence , gravity, and good faith, and his prior "significant and substantial" findings. Mr. Curry advised him that it was possible that Mr. Koons would not be paid for the time spent at the conference (Tr. 49).

Mr. NcNece testified that subsequently, on June 3, 1982, while at the mine for a regular inspection, Mr. Koons advised him that he had not been paid for the time he spent on the May 24, 1982, conference, and that mine management confirmed that he was not going to be paid. Mr. McNece then issued citation no. 1225641 (Tr. 49).

Mr. McNece stated that the May 24, 1982, conference was new to everyone, and that at the present time such conferences are held at the end of each inspection day or week, and any citations issued during the day or week are discussed with mine management and the miner representative. The present conference also includes any findings of negligence, good faith, and gravity, which now appear on the face of the new MSHA citations in lieu of the previously executed inspector's "narrative statement" or "gravity sheet" which is no longer in use (Tr. 51).

Mr. McNece confirmed that in the past, "inspector's findings", which were recorded on the "narrative statement", were not discussed with mine management, but since a new "combined" citation form is now in use, management has an opportunity to discuss the inspector's gravity, negligence, and good faith findings at the time the citation is served (Tr. 52-54).

Mr. McNece explained that prior to the new Part 100 procedures he would hold a preinspection conference at the beginning of each regular inspection period for the purpose of alerting mine management and the miner representative of his presence, and that this usually took 10 to 15 minutes. Thereafter, he would submit his weekly and interim inspection reports to his subdistrict office, and on the last day of the inspection period a "close-out conference" was held, with mine management and the miner representative present, to discuss all of the citations issued during the inspection period (Tr. 63-65).

Mr. McNece stated that under the new Part 100 procedures, he holds weekly conferences at the close of the day on Friday with the mine and union representative present to discuss the citations issued during the week, and that these last half hour or 45 minutes, depending on the number of citations issued. These conferences include a discussion of the conditions cited as violations, and the negligence, gravity, and good faith compliance regarding each citation. At the completion of the inspection cycle, a similar "close-out conference" is held, but it is limited to any citations issued during the last week of the inspection period (Tr. 66).

In response to UMWA cross-examination, Mr. McNece confirmed that of the 14 citations "conferenced" by him on May 24, 1982, two were modified and his "significant and substantial" (S&S) findings were revoked. The remaining 12 citations, which included "S&S" findings, were reaffirmed as originally issued, and he explained why he modified some citations and left the others intact (Tr. 74-78).

In response to SOCCO's cross-examination, Mr. McNece confirmed that while on a physical inspection of the mine, a company representative and a miner's representative are usually with him, and conversations do take place among this "inspection party" with regard to any violations which may arise. After the completion of the inspection walkaround, he reduces his findings to writing and serves any citations on the mine operator (Tr. 83).

Mr. McNece testified that he did not conduct a physical walkaround inspection of the mine on May 24, 1982, but devoted the day to "conferenceing and modifications of previously issued citations" (Tr. 83-84). He recalled that the discussions concerning the 14 citations took place from approximately 9:00 a.m. to 12 noon, and that he devoted the rest of the afternoon, until approximately 3:30 p.m., on "paperwork" connected with the citations (Tr. 88-90).

Mr. McNece confirmed that he also issued a citation because mine representative Goble had not been compensated for the conference of May 24, 1982, with MSHA inspector Beck (Tr. 93, exhibit R-1). He also confirmed that in the future, similar conferences will be held at the mine, and the amount of time that such meetings will require depends on the number of citations which are issued and discussed (Tr. 94).

Mr. McNece confirmed that the conference of May 24, 1982, included discussions of gravity and negligence. He could not recall whether he had any information concerning the relative "number values" for negligence, gravity, and good faith, but did confirm that respondent's safety representative Curry did. Mr. McNece confirmed that he was only concerned with the factors of negligence, gravity, and good faith and not with "numbers or points" (Tr. 97-98).

The UMWA's testimony and evidence

The UMWA representative who participated in the hearing in these proceedings stated that he had never seen the "Lamonica interpretative bulletin". He did concede that he was aware of the fact that if a miner's representative exercised his right to a conference held off mine property at MSHA's district office, he would not be entitled to compensation, and that this has been the position taken by the UMWA on this question (Tr. 139).

Robert Koons, testified that he is employed at the Meigs No. 2 Mine as a lampman, and that he has served as the chairman of the health and safety committee for approximately 8-1/2 to nine years. He confirmed that he attended the conference in question on May 24, 1982, to discuss certain citations issued at the mine, and he believed that conferences of this kind benefit the miners as well as mine management. In his view, if he were not compensated for the time spent at these conferences, the local union would be unable to afford a representative to be present (Tr. 144-146).

On cross-examination, Mr. Koons confirmed that Mr. Goble was present during part of the conference with Mr. McNece, and he then stayed for his own meeting with Mr. Beck. He also confirmed that he does meet on a regular daily basis with mine management in regard to mutual safety concerns (Tr. 147).

Mr. Koons confirmed that since May 24, 1982, he has met with MSHA District office manager Gaither Knight at Wellston, and with a mine management representative present, at a "second conference," and he was not paid for attending that conference (Tr. 148). He confirmed that he was not paid for the May 24, 1982, conference with Inspector McNece and that he lost five hours of pay. He stated that his presence and participation at that conference was with respect to the matters addressed in the citations under discussion, and he confirmed that he is responsible for reporting the results of the conference to his member ship (Tr. 155).

In response to further questions, Mr. Koons stated that with regard to the citations discussed on May 24, 1982, he may have been on the initial walkaround inspection when some of them were issued, but not on all of them (Tr. 157). He estimated that four to six union walkaround representatives may have been with the inspectors who issued the 14 citations in question (Tr. 158). When asked whether all of these walkaround representatives were entitled to be present at the conference of May 24, and to be compensated for their attendance, he responded as follows (Tr. 159-160):

Q. Do you feel personally that those six were also entitled to be present on May 24?

A. Well, it would be impossible because some of them work different shifts and they would have to be summoned into the mine.

Q. Well, let's assume that happened. Let's assume one fellow was on the night shift and he decided to have a conference during the day time and you picked up the phone and called this fellow, got him out of bed or something, said, hey, come on to the mine, we're having a conference on the citation issued last when you were the walk-around. The guy comes out to the mine. Do you feel that he has a right, number one, to participate in that situation and, number two, do you think he ought to be compensated for that, just your personal opinion?

A. That's a pretty tough question. I don't know. I think if I was calling out to the mine I would be certainly entitled to compensation by somebody if I was to come to begin with.

Mr. Koons indicated that the conference of May 24 was "unusual" and the "first of its kind", and that is why he wanted to be present. He confirmed that the usual procedure is for other safety committee members to travel with inspectors and "conference" any citations, and in those instances he simply receives the safety committeemen's reports (Tr. 161). He believed the conference in question was unusual because "it was a new change being introduced. They done away with the assessment officers and they was doing it on the mine site conference and these type violations" (Tr. 161). Mr. Koons confirmed that as a general rule when he is engaged in union business in his capacity as representative of the miners he is normally compensated for his time either by the company or the union (Tr. 174).

Mr. Koons confirmed that prior to the new procedures, he would participate in a preinspection conference with the inspector and mine management, and that this would last approximately 15 minutes to a half hour. The inspection would then take place over a three month period and the inspector would be there everyday. At the conclusion of this three month inspection, he would participate in the "clost-out conference" to discuss all citations which may have been issued during the three month period, and this would last three to five hours (Tr. 175-176).

Mr. Koons confirmed that since May 24, 1982, he still participates in the preinspection conference. However, weekly conferences are now held to discuss all citations issued during the week. In addition, if there is a spot inspection, a daily conference may also be held. Further, at the end of the quarterly inspection cycle, a close-out conference is also held (Tr. 177).

Southern Ohio's testimony

Carl R. Curry, safety supervisor, Meigs No. 2 Mine, testified that the Meigs No. 1 and 2 Mines, as well as the Raccoon Mine, are separate underground mines which are inspected by MSHA four times a year and that each inspection lasts approximately three months (Tr. 225). He confirmed that he was the company representative in attandance at the May 24, 1982, conferences which resulted in the issuance of two of the citations in question (Tr. 227, exhibits R-1 and R-2).

Mr. Curry confirmed that during the past three years he attended assessment conferences in Lexington, Kentucky, and in Columbus and Athens, Ohio, away from the mine, and that the only people in attendance were himself and the MSHA assessment officer (Tr. 228-229). He and the assessment officer discussed grativy, negligence, and good faith compliance "points" as well as the facts and circumstances surrounding the citations under discussion (Tr. 230).

Mr. Curry stated that since May 24, 1982, his conferences are similar to those held at the mine with the inspector on that day, and the only difference is that the inspector conducts the meeting, discusses his citations, and solicits comments from the union and mine management (Tr. 232).

Mr. Curry stated that prior to the May 24 conference, he attended a meeting at MSHA's new Lexington subdistrict office at which time the new part 100 procedures were explained to him, and he was given a handout explaining the number of "points" which would be assessed for the "blocks" checked on the inspector's citation form. He confirmed that he had this handout with him at the May 24 conference (Tr. 232-233). He also stated that at the MSHA meeting he was advised that the "old assessment conferences would be a thing of the past" (Tr. 234).

Mr. Curry produced the notes and comments which he made during the May 24 conference and they were received in evidence (Tr. 238, exhibit C-1). He confirmed that Mr. McNece conducted the conference, and present were Mr. Koons, MSHA inspector Myron Beck, and UMWA worker Frank Goble. Mr. Beck conducted the second meeting that day and Mr. Curry sat in on that one with Mr. Goble, the miner representative. The meetings were held in the mine office conference room, and they were similar to the previous assessment conferences which he had attended. However, dollar amounts were not discussed, but these amounts were "labeled for us for each one of those points" (Tr. 243).

On cross-examination, Mr. Curry confirmed that when he previously participated in assessment conferences he knew what the assessments were and that his input usually resulted in a 25% reduction (Tr. 248). At the present time, he does not talk to the inspector about "points", but generally discusses the boxes he checks on the citation form (Tr. 251). Mr. Curry confirmed that 80 to 90% of the citations issued at the mine are taken to the second stage conference under the new regulations, and that only after this conference is he formally told what the actual civil penalty is (Tr. 260).

Additional testimony and arguments made at the hearing

Although he first insisted that he conducted a regular inspection of the mine on May 24, 1982, Inspector McNece finally conceded that he conducted no underground or surface physical inspection of the mine and that his sole purpose for going to the mine that day was to discuss 14 previously issued citations which had not been assessed under the new part 100 regulations (Tr. 99-102). At one point during his testimony, he indicated that his mere presence on mine property, even though he spent the time "conferencing" was a "regular mine inspection." When asked whether his position would be the same if he conducted the "conferencing" at a Holiday Inn across the road from the mine, he replied that this would not be a "regular mine inspection" because the Holiday Inn would not be on mine property (Tr. 101).

Mr. McNece stated that MSHA's policies and instructions require him to conduct any Part 100 "initial conferences" on mine property, and that these conferences may not be held elsewhere. However, should a "second conference" be necessary to further discuss any disagreements voiced by mine and union representatives, these are usually held at MSHA's field office, and the representative of miners is not required to be compensated for this second conference (Tr. 103). Compensation is only required for the initial conference (Tr. 103).

On the one hand, Inspector McNece claims he was at the mine on May 24, 1982, to afford the respondent an opportunity to avail itself of the new Part 100 regulations. On the other hand, MSHA's counsel stated on the record that Mr. McNece was there to only consider his "S&S" findings. In this regard, counsel stated as follows at Tr. 108-114:

> JUDGE KOUTRAS: Isn't that precisely what happened in this case, in this docket number, on May 24th he went back there for the specific purpose of conferencing 14 citations that were previously issued where the operator had not had an opportunity for it to go through the assessment office, and under these new regulations it says, effective on -- the effect on prior regulations, the prior Part 100 remained in effect for the prior assessing of all citations and orders where an initial review under 100.5(b) has been issued before May 21, 1982. These 14 citations did not go through the Part 100 assessment stage, and that's what the inspector did when he went back on May 24 was to give the operator an opportunity to have those 14 citations looked at from an assessment point of view on that day; isn't that true?
>
> MR. FITCH: Looked at for implementation of the significant, substantial findings from National Gypsum, which is in reality the only thing that he did during those conferences was apply National Gypsum.

JUDGE KOUTRAS: No. no, no. He made a determination that the gravity on two of them wasn't that severe.

MR. FITCH: As a result of National Gypsum.

JUDGE KOUTRAS: That's the only reason he went out there.

MR. FITCH: Yes.

JUDGE KOUTRAS: So you're telling me now that these conferences today if he were to go out there to that mine next Monday and he would hold a similar type -- would he hold a similar type conference as was held on May 24th?

MR. FITCH: He would be dealing with only the citations issued since the last conference session.

JUDGE KOUTRAS: That's right. And what would he be doing with those, the same type of things he did with these?

MR. FITCH: Yes.

JUDGE KOUTRAS: Looking at them for what, to upgrade them or downgrade them?

MR. FITCH: Upgrading or downgrading but giving the operator an opportunity to provide information.

* * * * * * * * * *

JUDGE KOUTRAS: Does it have to be at the mine?

MR. FITCH: We are interpreting the 103(f) to say that that first one is part of the inspection and that it is going to be at the mine and that it's a compensatory session.

JUDGE KOUTRAS: Why do you say that, because of the physical examination provision of the statute that you can't examine the mine if you're downtown in MSHA's office?

MR. FITCH: Basically because everybody has got their notes with them, and the mine site is the proper place, and 99 percent will be dealt with only at the mine site, and that maybe at our discretion we will grant a request within ten days to give a conference at the local MSHA office where theoretically the company can get in their car and drive down to the MSHA office and walk in and do a hard sell.

* * * * * * * * * *

JUDGE KOUTAS: If that discretionary meeting is given to all parties, downtown at the MSHA district office, is the miners' representative -- assume he's one of the parties, is he entitled to be present?

MR. FITCH: He's entitled to be present.

JUDGE KOUTRAS: Is he entitled to be compensated?

MR. FITCH: The present administration takes the view that he's not.

JUDGE KOUTRAS: Is this office chitchat, this present administration takes the view or is it some place embedded in stone?

MR. FITCH: It's the interpretation of my client that the --

JUDGE KOUTRAS: Where is that?

MR. FITCH: That 103(f) walk-around pay rights extends to conferencing at the mine site and --

JUDGE KOUTRAS: But not downtown under this?

MR. FITCH: That it does not.

JUDGE KOUTRAS: Where -- is that written some place, Mr. Fitch? Is that in this policy guideline some place?

MR. FITCH: It's not written.

JUDGE KOUTRAS: Now, to be consistent why is it not that a miners' representative can't be compensated for a conference downtown which the very regulation gives them that discretion, but they can if they hold it at the mine site? What's the distinction? Why in one and not in the other? Don't you find some inconsistency in that position? Because if a post inspection conference is a post inspection conference that's compensable, what difference does it make where it's held or when it's held?

MR. FITCH: Your Honor, lawyers do not always get to argue their view of the law and --

JUDGE KOUTRAS: Well, I'm giving you an opportunity to do that here. Don't you find some inconsistency in the Secretary saying, look, if under Part 100.6 here under (a) all parties shall be afforded an opportunity to review with MSHA each

> citation and order issued during an inspection, what that means is, judge, that right after the inspection or at least sometime closely after the inspection we sit down, the MSHA inspector sits down with mine management and the union representative to discuss the issues. And this is a lot of give and take, et cetera, et cetera. Okay. But ten days later if the operator has some additional input that would change MSHA's -- I mean the inspector's position or if the mining representative has some direct input, he goes to the district manager and says, wait a minute, I forgot something very important. I want an opportunity to be heard again. And MSHA says, fine, we grant you that right to meet with the district manager downtown at his office, and they all go downtown, but we don't compensate you for that. We don't see that as a conference. I don't see the distinction; do you?
>
> MR. FITCH: I would say that a lawyer could conclude that those two conferences are similar in nature and that they indeed should both be covered by compensation. My client's position is that it is a conference which takes place off of the mine. There has never been an interpretation that compensation coupled with participation rights exists off mine property.

SOCCO's counsel argued that it is clear from Mr. McNece's testimony that the May 24, 1982, conference was conducted pursuant to Part 100 of MSHA's regulations, that subsequent conferences have been held on either a daily or weekly basis involving the application of Part 100, and that these are identical to the May 24th conference. However, counsel asserts that MSHA has cited no authority to support its position that these conferences are compensable. Counsel suggested that the only change has been the elimination of the "old assessment conference" at which the miners' representative's participation was not compensable and a new procedure integrated for determining penalty points. Counsel pointed out that he is not arguing that the conferences may not be useful, that the UMWA has not been helpful, or that they should not take place. His argument, simply stated, is that there should be no right to compensation from Southern Ohio for these conferences (Tr. 207-208).

MSHA's position is that the conference which took place on May 24, 1982, was part of the pre- or post-inspection conference concept that has evolved under the authority of section 103(f) of the Act, and that these conferences at the mine site are properly compensable walk-around conferences and that the right to pay is co-extensive with the right to participate in the conference at the mine site (Tr. 208-209). The UMWA concurred in MSHA's position (Tr. 209).

MSHA's counsel took the position that all that is required to invoke the section 103(f) compensation and participation co-extensive rights is that a conference is held at the mine site related to an inspection related to citations, and the fact that the conference may be held well after the issuance of the citation being conferenced is not controlling (Tr. 215).

Posthearing briefs and arguments

In their posthearing briefs, MSHA and the UMWA make the point that Congress intended the miners to be active participants in the inspection process conducted at the mine site, including attendance at any opening and closing inspection conferences. Citing the legislative history of section 103(f), the UMWA argues that if Congress did not expect miners to be mere passive observers during the inspection, but to actively participate, increase their safety awareness, and be fully apprised of the inspection results, then the conferences held in the cases at hand must be considered within the scope of section 103(f). Citing testimony at the hearing that one focus of discussion during the conferences concerned the inspector's determination of whether the violation was "significant and substantial", under the Commission's ruling in Secretary of Labor v. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981), this would include a discussion of whether the violation had a "reasonable likelihood of resulting in an injury or illness of a reasonably serious nature". The UMWA suggests that this type of discussion, centering on the possible injury or illness posed by various conditions, is exactly the sort of discussion Congress expected the miners to participate in and benefit from.

Relying on Inspector McNece's testimony, the UMWA asserts that until last summer, the close-out conference operated essentially as a "one-way street" in that MSHA inspectors did little more than inform the operator and miner representative of the enforcement action the inspector intended to take as a result of the inspection, and while miners and operators would know the number of withdrawal orders and citations that were issued, they usually knew little else. Further, the UMWA suggests that the operator was not informed of the reasoning behind the inspector's findings, and that inspectors rarely, if ever, modified their findings or the statutory section under which the citation was issued. If the operator disagreed with the enforcement action taken by the inspector, the operator had to either file a notice of contest with the Commission or appeal the amount of the penalty that was ultimately assessed.

The UMWA maintains that the current close-out conferences may result in the inspector modifying or even vacating various citations he has previously issued. This being the case, the UMWA argues that there is no way a miner walkaround representative could be kept "fully apprised of the results of the inspection" if he does not attend these conferences. Since some modifications, such as downgrading a 104(d) violation to a 104(a) violation, could drastically affect the operator's status under the Act, the UMWA suggests that unless he is present at the close-out conferences, the miners' representative will have no way of rebutting the operator's contentions or of knowing what enforcement action the inspector ultimately took as a result of the conditions observed during the inspection. Further, since the mine employees have a vital stake in seeing that the Act is vigorously enforced as an effective deterrent against violations, the UMWA maintains that they will not be able to protect that interest if they are precluded from attending the close-out conference, since denying pay for the miners who did attend effectively precludes their participation.

The UMWA fails to see the relevance of SOCCO's contention that it has no obligation to pay the miners in question because the meetings in question were conducted as part of the penalty assessments procedure authorized by section 104 and 110 of the Act. The UMWA asserts that the fact that a particular conference might serve a purpose in the Secretary's procedure for assessing a penalty does not preclude the conference from being a post-inspection conference under section 103(f). The UMWA points out that there is nothing in the Act which states that the two events are mutually exclusive, nor does it define what constitutes a post-inspection conference, but rather, leaves these determinations to the Secretary of Labor's discretion.

Citing the decision in UMWA v. Federal Mine Safety and Health Review Commission, 671 F.2d 615 (D.C. Cir. 1982), cert. denied, 74 L. Ed 2d 189, another case challenging the Secretary's enforcement of the walkaround right wherein the D.C. Circuit Court of Appeals held that the Secretary's construction of section 103(f) "is entitled to deference unless it can be said not to be a reasoned and supportable interpretation of the Act," the UMWA maintains that the Secretary's determination that the meetings in question are properly categorized as "post-inspection conferences" under section 103(f) is certainly a reasoned and supportable interpretation of the Act.

In further support of its position in these cases, the UMWA points out that Section 103(f) refers to conferences "held at the mine", and it asserts that the conferences which are at issue in these proceedings were in fact held at the mine and that they played an integral part in the inspectors' enforcement efforts. The UMWA states further that Inspector McNece conceded that certain enforcement actions he had taken during his inspection were modified as a result of his meeting at the mine, and that the discussions which took place about the gravity and the cause of the cited violations contributed to the miners' safety and health awareness and their understanding of the Act's requirements, purposes which the UMWA contends Congress expected Section 103(f) to serve.

In response to SOCCO's contention that the meetings in question cannot be considered post-inspection conferences because no part of the mine was actually inspected on the days the meetings occurred, the UMWA argues that the meetings related to inspection activity that had occurred within the few weeks or months prior to the meetings in question, and since Section 103(f) does not state how long after an inspection a post-inspection conference is to occur, the fact that the meetings in question took place when they did does not render the Secretary's interpretation unreasonable.

The UMWA concedes that the meetings that gave rise to the instant proceedings are "unique" in that they were the first ones held after MSHA decided to expand the nature of the post-inspection conference to provide operators with the opportunity to explore the inspector's findings and offer rebuttal evidence. As a result, the UMWA admits that the conference in question here took longer than usual, and the discussions related to all the citations that had been issued but not yet assessed under the new procedures of Part 100.

In response to SOCCO's alternative contention that Section 103(f) mandates pay only for the actual inspection and not for the pre- and post-inspection conferences, the UMWA asserts that the legislative history of the 1977 Act reveals that the concept of inspection was broadened to include the pre- and post-inspection conferences and that Congress did not intend to eliminate the pay requirements during the period of the miner's participation in such conferences. Citing its earlier assertion that the current walkaround provision was adopted from the Senate version of the 1977 Act, the UMWA quotes from the Senate Report which refers to the pay requirement as follows:

> Section 104(e) contains a provision based on that in the Coal Act requiring that representatives of the operator and miners be permitted to accompany inspectors in order to asist [sic] in conducting a full inspection . . . It is the Committee's view that such participation will enable miners to understand the safety and health requirements of the Act and will enhance miner safety and health awareness. To encourage such miner participation, it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purpose of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. (Emphasis added.) Senate Report, supra at 28-29.

Finally, the UMWA argues that SOCCO's narrow construction of Section 103(f) not only conflicts with the legislative history, but is inconsistent with the approach taken by the D.C. Circuit in UMWA v. FMSHRC, supra. In that case, the UMWA points out that like the instant proceeding, the Court was confronted with an interpretation of Section 103(f) that attempted to distinguish between the miners' participation right and the right to pay. The operators argued successfully before the Review Commission that miners were entitled to participate in all inspections, but that section 103(f) required operators to pay miners only during their participation in the quarterly inspections of the entire mine. However, the UMWA points out further that after thoroughtly examining the language, the legislative history, and the purposes of Section 103(f), the Court concluded that:

> the right to walkaround pay is clearly coextensive with the right to accompany the inspector under subsection (f) [of sec. 103] and there is simply no basis for reading it as supporting the bifurcation of participation and compensation rights espoused in the Commission's decisions." UMWA v. FMSHRC at 626.

The UMWA suggests that if, as the Court held, the right to compensation is coextensive with the right to participate under Section 103(f), then miners cannot be denied pay for their participation in post-inspection conferences. The UMWA concludes that the miners' participation right under Section 103(f) is tied to the inspector's enforcement responsibilities at the mine, that Congress expected miners' representatives to assist the inspector in carrying out his duties, and the fact that the Secretary changes the method by which inspectors carry out their enforcement obligations should not deprive miners of their participation right under Section 103(f). If the inspector's enforcement duties have been expanded to include a periodic review of the citations and orders issued at the mine, then the UMWA suggests that Section 103(f) requires that the miners' participation right also be expanded to coincide with such changes.

In its brief, SOCCO argues that the facts here show that prior to May 24, 1982, MSHA's established procedure involved meetings held approximately once each month by an MSHA assessment officer, off mine property, usually in Lexington, Kentucky, and that its safety representative Carl Curry attended, but representatives of the miners did not, even though they had a right to attend. SOCCO asserts that at such meetings various factors ("gravity points")--such as the degree of negligence, the degree of good faith, and the number of persons potentially affected--were discussed as they might apply to each Citation that had been issued [Tr. 229, 230]. SOCCO maintains that except for the further fact that (a) the inspector now checks boxes on the bottom of the Citation form instead of having filled out a "gravity sheet", and (b) the discussion now centers upon "points"--which have dollar values--instead of directly upon dollars, the newly promulgated Part 100 meetings are essentially the same as the old assessment officer meetings [Tr. 50, 51, 66, 243, 248-250, 254, 268]. Carl Curry testified that at the new Part 100 meetings, such as those of May 24, 1982, he presents the same types of arguments, based upon the same considerations, as he once did at meetings before an MSHA assessment officer [Tr. 280, 281].

In further support of its factual arguments, SOCCO points out that when Inspector McNece performs his actual physical inspection duties at the mine, he typically discusses at that time any potential violations that he might discover with the management and miner representatives (the "walkarounds") and anyone else who might be in the vicinity of the discovery [Tr. 81, 82]. In addition, at the end of the inspection day, he frequently confers with the walkarounds about anything noteworthy from the inspection [Tr. 82, 83]. However, on the facts of this case, SOCCO points out further that Mr. McNece and Mr. Koons clarified the fact that the meetings of May 24, 1982--as well as all other subsequent meetings that have been held pursuant to Part 100--were different from the informal conferences that occur during and immediately after a physical walkaround inspection (Tr. 84-91, 144, 145, 179, 180). From the testimony of all three witnesses at the hearing, SOCCO concludes that it is evident

that this difference entails a focus upon the assessment of "gravity points" as required in such meetings by Part 100 (Tr. 86, 87, 97, 98, 179, 180). SOCCO cites the following testimony by Mr. Curry and Mr. Koons in support of its argument (Tr. 243; 161):

> The meetings were conducted very similar to the assessments conference we [previously had] attended in Lexington . . . [Tr. 243]. - Curry.
>
> * * *
>
> They [MSHA] done away with the assessment officers and they was doing it on the mine site conference . . . [Tr. 161]. - Koons.

SOCCO cites the testimony of Mr. Curry indicating that in approximately early May 1982, MSHA had held a meeting in New Lexington, Ohio, where it was explained that, under new Part 100, MSHA was doing away with the conferences before assessment officers and replacing them with conferences held by MSHA inspectors at the mine site [Tr. 233, 234]. The meetings held on May 24, 1982, which are the subject of two of the Citations contested here, were the first two such meetings Curry had attended [Tr. 227, 231]. At the prior MSHA meeting in New Lexington, Curry was provided with a hand-out which, similar to Part 100, equated "gravity points" with dollar values which he could, and did, use during the meetings of May 24 [Tr. 234, 239, 240, 249, 250, 268]. Recognizing the fact that the safety of miners is the foremost concern of a SOCCO Safety Supervisor, SOCCO nonetheless argues that at the assessment stage of any proceeding that supervisor must be vigilant about savings dollars and cents (Tr. 261-262), and maintains that as of May 24, 1982, MSHA had shifted the forum for this function from assessment conference to Part 100 conferences (Tr. 228-234).

SOCCO has submitted that the evidence regarding the third Citation (Raccoon No. 3 mine, Citation No. 1225867, LAKE 82-95-R) would not be materially different from the evidence concerning the first two, as summarized above [Tr. 11]. SOCCO also concedes that miner representatives Bob Koons and Frank Goble were not paid for their attendance at the new Part 100 meetings held on May 24, 1982.

With regard to its legal arguments in this case, SOCCO points out that each of the citations in these proceedings allege violations of Section 103(f) of the Act, and that this section of the Act, according to its own terms, concerns only "inspections, investigations, and record-keeping." Section 104 addresses "citations and orders," and Section 105 provides a "procedure for enforcement" of such citations and orders. Section 110 speaks to the "penalties" that might be assessed based upon action taken under Section 104, Section 105 or Section 107.

SOCCO argues that the evidence shows that the May 24, 1982, meetings that resulted in the contested Citations were held pursuant to new Part 100 of Title 30, Code of Federal Regulations. In turn, Part 100 states

that its purpose is to set forth "criteria and procedures for the proposed assessment of civil penalties under sections 105 and 110 ..." SOCCO notes that MSHA did not utilize Section 103 of the Act, which concerns inspections, in its promulgation of Part 100. For that matter, Section 104, concerning citations, was not employed either. Rather, Part 100 was proposed, revised and finalized by MSHA as an extension of its enforcement and penalty ("assessment") functions. Part 100 involves the further steps that logically occur well after the issuance of a citation during an inspection: that is, the assessment of a penalty as an enforcement matter.

SOCCO states that it does not contend that miner participation in important safety proceedings is, or should be, curtailed. Rather, its focus is on the Congressional intent that coal mine operators should bear the direct financial burden of supporting such participation only insofar as is set forth in Section 103(f) of the Act. Leaving aside the existing controversies as to the exact scope of the miners' right to be compensated by operators under Section 103(f), whatever the scope of this section might be, SOCCO maintains that it is clear that this right pertains only to inspections, and is unaware of the advancement of any allegation in any forum that this 103(f) right applies to any function other than inspection.

In response to MSHA's arguments at the hearing that Part 100 meetings constituted extensions of its Section 103 inspection functions, and thus were still "inspections", SOCCO finds no logic in such a position and maintains that the legislative fact is that such extensions represent, in actuality, a separate function: assessment. SOCCO maintains that Congress treated this function separately from inspection (Sections 105 and 110 as opposed to Section 103) and that MSHA has honored and preserved the distinction in its promulgation of Part 100 as setting forth "the criteria and procedures for the proposed assessment of civil penalties. . . See subsection 100.1 of Part 100." To now contend that Part 100 is part of inspection, MSHA must ignore the structure of the Act as well as its own characterization of its purpose and authority for promulgation of these regulations.

SOCCO submits that it is precisely because the miners' Section 103(f) right to compensation is tied directly to the inspection function which explains why MSHA has strained so mightily in these matters to attach an "inspection" label to the meetings of May 24, 1982. At the outset, MSHA Inspector McNece characterized each meeting as "a regular inspection of the mine which was pertaining to conference and modification of citations" in the language he employed in each contested Citation. SOCCO strongly suggests that the very choice of an employee who is labeled by MSHA as an "inspector" to hold the meetings required under Part 100 might reflect an additional MSHA attempt to fit the square "assessment" peg into the round "inspection" slot, and that MSHA's insistence that Part 100 meetings be held at mine sites -- despite the fact that the subject matter

of such meetings does not give rise to any logical reason why they might better be held there -- serves only to advance MSHA's effort to push an unwarranted cost upon the operators. Finally, SOCCO suggests that the constant use of the terms "conference" and "conferencing" during the hearing (and in much of the written material, too) to refer to meetings to review citations, as now required by Part 100, might well be designed to ram Part 100 through Section 103(f) of the Act -- which speaks of "pre- or post-inspection conferences" -- and into the inspection functions delineated by the Act.

SOCCO submits that (1) MSHA's efforts to place an "inspection" label on Part 100 meetings, (2) its use at such meetings of an employee it has labeled as an "inspector," (3) its insistence that such meetings occur at mine sites, and (4) the imposition of the Section 103(f) term "conferences" are all intended to achieve a result neither intended by, nor found in, the Act and the regulations promulgated pursuant thereto. SOCCO concludes that the new Part 100 regulations, including the requirement for review which prompted the May 24, 1982, meetings at issue in these proceedings, fulfills assessment functions -- and clearly says so -- and not inspection functions. Thus. SOCCO concludes that there is no legal requirement that it pay any Union walkaround representatives for the time such a representative may spend on the types of conferences that took place in these proceedings. SOCCO concludes further that the meetings held in these cases were not "conferences" within the meaning of Section 103(f), because they were meetings held in accordance MSHA's Part 100 assessment duties to provide a forum for review of previously issued citations and orders, and nowhere in section 100.6 do the terms "representative of the operator" or "a representative authorized by his miners" appear. Thus, SOCCO maintains that the structure and language of Part 100, for an "opportunity" to review by interested "parties" cannot be equated with a "conference" for "representatives" of operators and miners which may be part of the inspection process. SOCCO submits that I should reject MSHA's "strained attempt" to label the opportunities provided to review citations--as mandated by regulatory section 100.6(a)--as a "conference" falling within the ambit of Section 103(a) of the Act.

SOCCO argues that the only types of conferences mentioned in Sections 103(a) and (f) of the Act are pre- and post-inspection conferences, and in support of this conclusion, it cites the remarks of Representative Joseph M. Gaydos prior to House acceptance of the Joint Conference Report regarding the Act, as follows:

> The conference substitute expands the concept of miners' participation in inspections by authorizing miners' representatives to participate not only in the actual inspection of a mine, but also in any pre- or post-inspection conference held at that mine. The presence of such representative at an opening conference aids miners in understanding the concerns of the inspector, and attendance at the closing conference enables miners to be apprised more fully of the inspection results.

Legislative History of the Federal Mine Safety and Health Act of 1977 (Comm. Print 1978), 1361 (emphasis supplied).

SOCCO maintains that under the evidence presented in the cases at hand, it is clear that pre-inspection and close-out conferences, as referred to by Congressman Gaydos, have occurred and still do occur -- unaffected by the "Citation Conferences" mandated by Part 100. Pre-inspection conferences are to impart information as to what the inspection is intended to entail. The post-inspection, or close-out, conferences are used to go over the important elements of the inspection and to discuss specific ways to make the mine environment safer. Fulfilling separate purposes, Part 100 "Citation Conferences" are opportunities for interested parties to review previously issued citations, with special reference to "gravity" factors. Such a meeting is far afield from pre- and post-inspection conferences -- as set forth in the Act, as intended by Congress, and as established through experience. It is apparent, therefore, that a "Citation Conference" is not a Section 103(f) conference, and cannot be used as a basis to require operator payment to miner representatives.

In conclusion, SOCCO maintains that the language of Section 103(f) is clear and unambiguous, and only provides compensation of a representative of the miners for his participation only in inspections, and not in "conferences" or any other type of meetings. Citing a number of court cases at page 19 of its brief, SOCCO submits that the plain terms of Section 103(f) admit to no ambiguity as to this issue, and that the language authorizing what is commonly known as a "walkaround" to accompany an MSHA inspector "during a physical inspection of any coal . . . mine" is certainly clear. In the next phrase of the same sentence the language "such inspection" is used: an unambiguous reference back to the prior language "a physical inspection of any coal . . . mine". Within the very phrase wherein the "such inspection" language is employed, something further is added: ". . . and to participate in pre- or post-inspection conferences [emphasis supplied]." The fact that the connector "and" is used, and the fact that the "conferences" mentioned are those that occur before ("pre") or after ("post") an "inspection," leads inescapably to the conclusion that a "conference" is not a part of an "inspection" under Section 103(f).

Skipping over the next sentence of Section 103(f), SOCCO argues that the following sentence provides the miner compensation factor that MSHA insists has been triggered in these cases: ". . . shall suffer no loss of pay during the period of his participation in the inspection made under this subsection." Nothing more than this is stated in the Act about the obligation of an operator to compensate a miner representative. Nothing has been added to this direct statement that might lead to any reasonable inference as to what the language means. An inspection is not a conference, or any other type of meeting. The language of subsection (a), referenced in (f), does not say anything about conferences, or any other types of meetings, that might logically be viewed as having any effect whatsoever upon the distinction drawn in subsection (f) between an

inspection and a conference. Moreover, the ordinary definitions and usages of these two nouns show that they refer to separate and distinct types of occasions. Section 103(f) requires compensation for a certain category of "inspection," but does not mandate compensation for a "conference".

SOCCO's proposed conclusions of law include the following:

1. The procedures set forth in 30 C.F.R., Part 100 (47 Fed. Reg. 22294, May 21, 1982), are for the purpose of proposing the assessment of civil penalties under Sections 105 and 110 of the Act.

2. Section 103, including subsection 103(f), of the Act concerns inspection functions, and does not involve the assessment of civil penalties.

3. The right of a miner representative to be compensated by the operator in conjunction with that representative's participation in an inspection (as defined and limited by Section 103) has no application to a proceeding under Part 100.

4. SOCCO has no duty under subsection 103(f) to compensate a miner representative for his participation in the meetings of May 24, 1982, or any other meetings held pursuant to Part 100.

5. In the alternative, and as wholly independent bases for reaching the same conclusion as is set forth in the immediately preceding paragraphs, SOCCO suggests that:

   (a) an "opportunity to review" as described in 30 C.F.R. § 100.6(a) is not a "conference" as that term is used in Section 103(f) of the Act; and

   (b) Section 103(f) does not mandate payments by operators to miner representatives for their participation in any "conference".

Findings and Conclusions

The Secretary of Labor has the authority to promulgate mandatory safety and health standards and to enforce those standards through mine inspections. Upon inspection of the mine, if violations are found to exist, the inspector may issue citations and withdrawal orders. Section 105(a) of the Act provides that if the Secretary of Labor

issues a citation or order, "he shall . . . notify the operator . . . of the civil penalty proposed to be assessed . . . for the violation cited and that the operator has 30 days within which to contest the . . . proposed assessment of penalty." 30 U.S.C. 6 815(a) (emphasis added). If an operator does not contest the Secretary's proposed penalty assessment, by operation of law the proposed assessment becomes a final order not subject to review by any court or agency.

When an inspector finds a condition or practice in a mine that he believes violates any mandatory safety or health standard, he will inform the mine operator of that fact so that corrective action may be taken. The usual practice for citations which do not present imminent danger conditions, or conditions giving rise to other withdrawal orders, is for an inspector to make some notations as to the conditions he observes and to note the specific regulation cited. Absent any withdrawal orders, the inspector continues on his inspection rounds, and at the conclusion of the inspection, and usually while on the surface, he will reduce his findings to writing on a citation form and will serve it on the operator. At that point in time, the inspector has already concluded that a violation exists, and both the miners' and mine operator's representatives are apprised of the conditions or practices observed and cited.

In addition to the arguments made at hearing, and its references to the legislative history and the court decisions in UMWA v. FMSHRC, supra, and Magma Copper Company v. Secretary of Labor and the FMSHRC, 645 F.2d 694 (9th Cir. 1982), MSHA argues that liberal construction of the Act dictates that great deference should be given to its position in this case in order to help achieve the Act's overall objectives of improving health and asfety conditions in the nation's mines.

The issue in UMWA v. FMSHRC was whether miners' representatives were entitled to compensation under section 103(f) for the time spend accompanying MSHA inspectors on "spot inspections", or, as held by the Commission in that case, whether compensation is limited to the four "regular inspections" required by section 103(a) of the Act. Magma Copper involved the issue of whether section 103(f) requires that, when an inspection of a mine is conducted by more than one inspector, each of whom acts separately and inspects a different part of the mine, one representative of miners may accompany each inspector without loss of pay.

In UMWA v. FMSHRC, supra, at page 619, the Court observed that the scope of a miner representative's right to participate in mine inspections, and his right to do so without loss of pay, are governed exclusively by sections 103(a) and (f) of the Act. The lead-in language to subsection (b) adds the caveat subject to regulations issued by the Secretary. Therefore, a critical question in this case is whether the regulations promulgated by the Secretary, as interpreted and applied by MSHA on the facts of this case, are in accord with the requirements of the Act. If they are not, a second question is whether the statute itself mandates that miners representatives be compensated for the time spent at the types of "meetings" or "conferences" which took place in these cases.

Section 103(f) clearly and unambigously mandates that miner representatives be given an opportunity to (1) accompany an inspector during the physical inspection of any mine for the purpose of aiding such inspection; and (2) to participate in pre- or post-inspection conferences held at the mine. It also seems clear to me that the clear and unambiguous language of Section 103(f) mandates that miner representatives be compensated during the time spent on the mine inspection. What is unclear is whether Congress intended that miners be compensated for time spent on conferences or meetings held at the mine after the actual physical inspection of the mine is completed.

On April 25, 1978, the Secretary issued his Interpretative Bulletin of Section 103(f), 43 Fed. Reg. 17546-17549 (exhibit R-3), and the stated purpose of the bulletin is reflected as follows:

> The purpose of this Bulletin is to make public certain interpretations of section 103(f) of the Act, which will guide the Secretary of Labor in the performance of his duties thereunder unless and until otherwise directed by authoritative decisions of the Federal Mine Safety and Health Review Commission (Commission), or of the courts, or until the Secretary concludes, upon reexamination of an interpretation, that modification is appropriate.

I have closely scrutinized the bulletin in question and can find no clear or concise language indicating the specific right of miners' representatives to be compensated for conferences held at the mine. The bulletin includes examples of the types of section 103(f) activities which give rise to participation and compensation rights by miners' representatives, and the types which do not. In each instance where a miner is entitled to participate and to be compensated for that participation, MSHA's condition precedent and emphasis is on a physical inspection of the mine.

The types of activities giving rise to section 103(f) rights are summarized as follows at 43 Fed. Reg. 17548:

> (1) "Regular inspections,"
> (2) The various kinds of "spot inspections,"
> (3) Inspections conducted at the request or miners of miners' representatives,
> (4) Inspections at especially hazardous mines, including mines liberating excessive amounts of explosive gases,
> (5) Inspections made in conjunction with accident investigations.

The explanatory language which immediately follows states as follows:

> It must be emphasized that MSHA carries out a wide range of activities at minesites. The

> administrative classification of a particular activity as an "inspection" does not necessarily control the applicability of section 103(f). While the list summarized above is generally inclusive of activities giving rise to section 103(f) rights, unusual factual situations may arise which require resolutions on a case-by-case basis. The general rule will be that the participation right under section 103(f) arise when: (1) an inspection is made for the purposes set forth in section 103(a), and (2) the inspector is present at the mine to physically observe or monitor safety and health conditions as part of direct safety and health enforcement activity. (Emphasis added)

And, at 43 Fed. Reg. 17547:

> Section 103(f) does not necessarily apply to every situation in which a representative of the Secretary is present at a mine. Rather, section 103(f) contemplates activities where the inspector is present for purposes of physically observing or monitoring safety and health conditions as part of a direct enforcement activity. This is indicated by the text of section 103(f) itself, which refers to "physical inspection" where the presence of miners' representatives will "aid" the inspection. (Emphasis added)

The types of activities which do not give rise to miners' representative participation and compensation are noted at page 17548 of the bulletin, and they include the following:

1. Technical consultations.
2. Demonstration of prototype equipment.
3. Safety and health research.
4. Investigations and other activities pursuant to petitions for variances.
5. Field certification of permissible equipment.

Included in the explanation of the matters excluded from miner representative participation and compensation, is the following, at page 17548:

> In these types of activities, while there may sometimes be a need to physically observe or monitor certain conditions or practices, this aspect of the overall primary activity is incidental to other purposes. Although

> enforcement action could result from certain of these activities, the relationship of the activities to enforcement of safety and health requirements is indirect, or the activity is being carried out in accordance with other duties under the Act. The continuing presence of a representative of miners in all phases of these activities would not necessarily aid the activity. (Emphasis added).

Exhibit R-4 is a copy of MSHA's Policy Memorandum No. 83-19-C, dated June 16, 1983, and exhibit R-5 is a copy of Policy Memorandum No. 82-21-C, dated June 24, 1983, and they are both signed by the Administrator for Coal Mine Safety and Health, Joseph B. Lamonica.

The June 16, 1983, memorandum generally explains the rights of parties for review of citations and orders under the newly promulgated Part 100 regulations, 30 CFR 100.6. The memorandum explains that the review process pursuant to section 100.6(a) includes an opportunity for all parties to review with MSHA each citation and order issued during an inspection, and that this would generally occur at the inspection close-out conference. For issues not resolved at this level of review, the memorandum goes on to explain that pursuant to section 100.6(b), an additional opportunity is available to the parties by means of a discretionary conference with MSHA's District Manager or his designee.

The June 24, 1982, memorandum in its entirety, states as follows:

> The inspection close-out conference should be held, in most instances, immediately after the completion of an inspection. This procedure will normally allow for the timely discussion of inspection findings and will not cause undue delays in the processing of cited violations. When an inspection is on-going or takes longer than one week to complete, a different procedure is necessary so that findings may be conferenced and processed with reasonable promptness. In order to ensure the timely discussion of the issues, an inspection close-out conference on cited violations should be held at lease weekly during all inspections that are greater than one week in duration.
>
> At many complex multi-shift operations, short close-out conferences have been held at the end of each shift or at the end of each inspection day. This procedure may continue to be used if agreeable to the parties involved; however, the last close-out conference of the week should be used to afford all involved parties the opportunity to discuss the weekly findings and to

> extablish the control date for the health and safety conference ten-day request period. The weekly close-out conference may be postponed and rescheduled if a different time is more convenient to the parties involved.

At page 10 of its brief, MSHA implies that the conferences in question in these proceedings were incorporated into its inspection procedure by the May 21, 1982, new Part 100 regulations. Recognizing the fact that its Interpretative Bulletin does not directly address itself to the question presented here, MSHA nonetheless argues that the Secretary's determination, based on the principles included in the Bulletin, that the conferences in question are covered by the statutory language of section 103(f), is entitled to deference because it is consistent with a construction of the Act which best effectuates the legislative purpose.

MSHA asserts that while the conference may have a penalty result or effect, the true purpose of the conference is to determine whether the inspector has properly analyzed the facts associated with each citation and to allow the parties an opportunity to correct misunderstandings or improper findings and conclusions. Any penalty effect would not come until after a determination has been made of the accuracy of the findings that the inspector is required to make as part of the citation issuing process. Since the inspector must make a determination on whether a violation is significant and substantial, as well as general findings on negligence, gravity, and good faith abatement, such findings are not susceptable to bargaining, but may be changed based on facts which the inspector may not have been aware of at the time the violation was issued. Thus, the ability to have this conference at the mine site, in the presence of all parties, implements the pre- and post-inspection conference concept included in section 103(f) more fully than the prior assessment procedure which have been replaced by MSHA's new procedures.

MSHA rejects out of hand the assertion by SOCCO that the mine conferences authorized by 30 CFR Part 100.6 are merely a replacement of the old assessment conferences previously held in MSHA's district offices. MSHA maintains that it is not, and has never been, its intent that the new health and safety conference would serve as a retitled assessment conference. MSHA maintains that the new procedures are directed at safety, and while civil penalties may be the ultimate result of all citations, the precise penalty is determined on the inspector's findings, but not by the inspector. The mine site conferences are simply an amplification and expansation of the prior existing close-out conferences conducted after all mine inspections.

Both MSHA and the UMWA emphasize the fact that miners have to play an active part in the enforcement of the Act and that achievement of this goal is dependent in great measure upon the active but orderly participation of miners at every level of safety and health activity.

While I do not dispute this, the fact is that miners are not given the right to compensatory participation at "every level of safety and health activity". One example of this are the exclusions itemized at 43 Fed. Reg. 17548, whereby miners may not participate and be compensated under section 103(f) in some rather basic areas of mine safety and health. Another example is section 100.6(b) of MSHA's regulations. Under this section, a mine operator has an opportunity for a "manager's conference" with MSHA's district office officials, and at that conference the operator has a second opportunity to seek further modifications and revisions in any citations or orders which may have been discussed at the first conference held at the mine. Both MSHA and the UMWA concede that while miners' representatives may be present at this conference, they are not eneitled to compensation under section 103(f) because the conference is held away from the mine. Without compensation, a miners' representative is effectively excluded from any participation.

A third, and most important example of what I believe to be a contradictory position taken by the UMWA and MSHA is the fact that in any given case, the miner representative who participates in the so-called weekly or monthly close-out conferences may not be the same miner representative who walked around with the inspector who issued the citations or orders which are subsequently "conferenced" well after the date of their issuance. Other than reviewing a piece of paper, I fail to comprehend how that mine representative, who is not present during the physical inspection of the area of the mine cited, and who has no personal knowledge of the conditions observed by the inspector who issued the citation, can make any intelligent or rational contribution to any discussion concerning the violative conditions, particularly where the discussions take place well after the fact, after the mine conditions have changes, and in many cases, after abatement has taken place.

It is clear from the record in these cases that the miners' representatives who were not compensated for their particiaption in the conferences which took place on May 24 and 26, 1982, were not present as the walkaround representatives during the actual physical inspections which gave rise to the issuance of all of the citations which were issued during those inspections, and which subsequently became the subject of the conferences in issue. Mr. Koons confirmed that there could have been four to six different walkaround representatives on the inspections (Tr. 157-158). Further, the record here shows that the citations which were the subject of the May 24, 1982, conferences conducted by Inspectors McNece and Beck, were issued during mine inspections conducted on March 3, 5, 9, 16, 19, April 21, 26, 28, and May 5, 7, 10, and 13, 1982 (exhibit C-1), and notations on this exhibit reflect that they were served on five different company management representatives who accompanied the inspector, and Mr. Curry was not one of them.

Given the above circumstances, I again fail to comprehend how any meaningful safety discussions could have taken place on May 24 and 26, 1982,

apart from mine management's efforts to reduce the inspector's "S&S" findings to "non-S&S". Addressing the "uniqueness" of these cases, MSHA's counsel conceded that it is not the usual practice to hold inspection close-out conferences two months after citations are issued, and he conceded further that a conference held on May 24th to address conditions which were cited the previous March 3d, would not allow for any meaningful discussion of the conditions or problems cited in the citation (Tr. 210).

At page five of its brief, the UMWA states that under MSHA's current procedures, "the close-out conference could result in the inspector changing his opinion about whether the violation was significant or substantial, or whether it was caused by the negligence of the operator". Should this occur, the UMWA goes on to state that "the operator is free to commit these violations over and over without fear of a withdrawal order under section 104(e)." If this is the case, then the UMWA should be arguing for repeal of the regulation which affords a mine operator an opportunity for such a conference.

My observation is that it is not unusual for an inspector to change his mind. Such changes in an inspector's "S&S" findings are sometimes made by an inspector during trial testimony, they are sometimes modified by an inspector after consultation with MSHA's trial counsel in advance of a trial, and they are sometimes the subject of "settlement negotiations" between trial counsel. Of more significance is the fact that under MSHA's regulatory section 100.6(b) and (d), a mine operator has an opportunity at the "Manager's Conference", at which a miner representative may not be present because he is not entitled to compensation, to seek further modification or changes in the inspector's findings, and examples of such changes are the following:

-- downgrading an "S&S" citation to "non-S&S".

-- vacating an imminent danger order issued under section 107(a).

-- modifying a section 104(d)(1) order to a section 104(a) citation.

-- convincing the inspector to change his gravity or negligence findings by checking a different box on the citation form.

During the hearing, Inspector McNece was of the opinion that Part 100 does not provide for compensation for miners' representatives who attend the discretionary "management conference" pursuant to section 100.6(c), but that compensation is required for the "initial conference" (Tr. 103). In response to my inquiry to pinpoint the regulatory language to support the inspector's opinion, MSHA's counsel stated that compensation for conferences at the mine site comes directly from Section 103(f) of the Act,

and that it is a statutory right and not a regulatory right (Tr. 105). In further explanation of the compensatory nature of the two conferences authorized by section 100.6, MSHA's counsel stated that "we are interpreting the 103(f) to say that that first one is part of the inspection and that it is going to be at the mine and that it's a compensatory session" (Tr. 110). When asked why the initial conference must be held at the mine, counsel replied "so that everybody is around who is involved" and "everybody has got their notes with them" (Tr. 105, 111).

Neither the Act, the Secretary's regulations, his interpretative bulletin, or the policy memorandums cited previously in this decision, define the terms "pre-inspection conference" or "post-inspection conference". Further, while the legislative history citation to the Senate Report (Pg. 15 of this decision), uses the terms "opening" and "closing" conferences, the other citations to the legislative history contain no such terminology, and section 103(f) of the Act contains no such language. I conclude that the terms "pre" and "post" have the same meaning as the terms "opening" and "closing" insofar as the application of section 103(f) to the facts of these cases are concerned.

In practice, I believe that one can reasonably conclude that a "pre-inspection conference" takes place after an inspector arrives at the mine, identifies himself to the mine operator, and states his business. At that point in time the "inspection party" is assembled, and its members include a representative of the mine operator and the employee "walkaround" representative. The inspection party collectively chart out the metes and bounds of the inspection and they proceed, as a group, to physically inspect the mine. The preliminary discussions which take place prior to any actual inspection can be loosely characterized as a "pre-inspection conference".

If the inspector finds any conditions or practices which he believes warrant the issuance of citations or orders, his usual practice is reduce his findings to writing from notes or other observations made during his inspection, and he does this by use of the citation form which he serves on the mine operator or his representative. During this process, the other members of the inspection party may or may not be present. If they are, they have an opportunity for some input or comment as to the inspector's rationale for issuing a citation or order, his fixing of an abatement time, etc., etc., and these discussions and exchanges may loosely be characterized as a "post-inspection conference".

My observations concerning the meaning of "pre-inspection" and "post-inspection" conferences are not too far afield from those expressed by the UMWA's former counsel, J. Davitt McAteer of the Center for Law and Social Policy, in his informative Miner's Manual, at pg. 296, as follows:

> Usually when the inspector arrives at the mine, he goes to the mine office and meets with the company officer to explain what he was come to inspect and ask questions about problems. That is the pre-inspection conference. (Your representative has the right to attend this meeting and to be paid (COAL: Act 103(f)).

> Your representative must let MSHA know that he wants to be called when the inspector arrives. At the meetings, your representative should explain the miners' concerns and point out problems.
>
> After the inspection, the inspector again meets with the company. This is the post-inspection conference, and your representative has the right to go and be paid. The inspector will discuss the problems and violations he found and will talk about fixing them in a certain amount of time. He may issue citations (notice or orders) for violations.

In the aforementioned circumstances, one may reasonably conclude that the time spent by the miner "walkaround" representative during the pre- and post-inspection "conferences" incident to the physical inspection of the mine which took place that same day is time spent as part of the inspection and therefore compensable under section 103(f). As a matter of fact the legislative history found in the Senate Report cited by the UMWA at page 15 of my decision here, as well as the remarks by Congressman Gaydos, cited by SOCCO at pages 19-20 herein supports such a conclusion. I take note of the fact that SOCCO failed to include in its brief the second paragraph of Mr. Gaydos' remarks, which are as follows:

> The conference substitute additionally authorizes the Secretary's representative to permit more than one miner representative to participate in an inspection and in inspection-related conferences. However, it provides that just one such representative of miners who is also an employee of the operator, is to be paid by the operator for his participation in the inspection and conferences. (Emphasis added).

I also take note of the fact that the UMWA failed to include the following statements from its citation to the Senate Report

> * * * To encourage such miner participation it is the Committee's intention that the miner who participates in such inspection and conferences be fully compensated by the operator for the time thus spent. To provide for other than full compensation would be inconsistent with the purposes of the Act and would unfairly penalize the miner for assisting the inspector in performing his duties. * * * (Emphasis added).

I take further note of the fact that none of the parties in this case saw fit to cite the remarks of Congressman Carl Perkins which appear at pages 1356-58, Subcommittee on Labor of the Senate Committee on Human Resources, 95th Cong., 2d Sess., Legislative History of the Act, (1978), I suspect that the reason for this is that in prior litigation in connection

with the right of a miner representative to be compensated for the time accompanying an inspector on a "spot inspection", the majority of the Court in UMWA v. FMSHRC, supra, was of the opinion that Mr. Perkins' floor statement in the House of Representatives following the adoption of the Act by the House-Senate conferees was not entitled to decive weight in the interpretation of section 103(f). Mr. Perkins' comments, in pertinent part are as follows:

> * * * the intention of the conference committee is to assure that a representative of the miners shall be entitled to accompany the Federal inspector, including pre- and post-inspection conferences, at no loss of pay only during the four regular inspections of each underground mine and two regular inspections of each surface mine in its entirety including pre- and post-inspection conferences. (Emphasis added).

While it is true that Mr. Perkins' comments, as well as some of the other lgeislative history and court citations discussed above, deal with the kinds of inspections for which a union walkaround representative is entitled to be compensated, they are relevant in that they specifically refer to physical inspections of the mine. The express purpose of such an inspection is to insure that a mine operator is complying with the law, and if he is not, to insure that compliance is achieved through prompt corrective action by the inspector conducting the inspection. It is in this setting that I believe Congress intended for full participation rights by a miner representative so that he can make some meaningful contribution to protect the safety and health of his fellow miners.

I conclude that the language of section 103(f) authorizing a representative of miners to participate in a post-inspection conference clearly contemplates his participation as part of the physical inspection of the mine made by the inspector with whom he travels during the inspection on any given day. Further, while the compensation language found in section 103(f) -- shall suffer no loss of pay during the period of his participation in the inspection -- does not specifically include the phrases "pre- and post-inspection conferences", I believe it is reasonable to conclude that Congress intended for compensation for the miner representative if he chooses to participate in the "conference" held at the mine by the inspector immediately or shortly after the completion of his physical inspection of the mine.

The express purpose of the civil penalty regulations found in Part 100 is to provide a regulatory framework for the application of the penalty criteria found in section 110(i) of the Act. The regulatory procedures establishing a "point system" for the initial assessment of penalties are in reality in a system whereby the mine conditions found to be out of compliance by an inspector are reduced to "points", and then translated into a fixed dollar figure for each violation. In my view, I believe

that during the legislative process which resulted in the 1977 Amendments to the Coal Act, Congress never contemplated the scope and effect of the elaborate regulatory civil penalty procedures found in Part 100. Insofar as the rights of miner "walkaround" representatives are concerned, Congress granted them subject to regulations issued by the Secretary. As indicated earlier in this decision, contraty to MSHA's assertion at page 5 of its brief that its policy memorandum (exhibit R-5) mandates that the type of conferences be held at the mine site, I can find no such specific requirement in that memorandum. While there may be an inference that MSHA contemplated the mine site to be the locale of such a conference, neither Part 100, the Interpretative Bulletin, or the policy memorandum dated June 16, 1982, (exhibit R-4), contain any specific requirement that such assessment conferences be held at the mine site.

At page 7 of its brief, MSHA asserts that "the mine site conference is an amplification of the prior close-out conference conducted after all inspections" and that they "expand on the close-out conference concept". While this is certainly true, in my view such "amplifications" and "expansions" must have some reasonable regulatory base, rather than on a somewhat arbitrary method of achieving "efficiencies" for the administrative convenience of MSHA.

On the facts of the instant cases, it is clear that no physical inspection of the mine took place at the time the inspectors went to the mine site to sit down with management and union representatives to discuss the citations which had not been previously assessed, and which were the subject of the new Part 100 regulations. It seems clear to me that had those citations been assessed under the old Part 100 regulations by MSHA's district office, there would have been no need for any of the inspectors to go to the mine site in question, and any participation or input by the UMWA with regard to MSHA's assessments, would have been at its own expense and would not have been compensable, and MSHA and the UMWA concede that this is true. The thrust of MSHA's argument in these cases is that no "assessment process" took place at the mine on the days in question.

The facts in this case establish that MSHA's new Part 100 civil penalty assessment regulations became effective on Friday, May 21, 1982. The following Monday, May 24, 1982, Inspector McNece went to the mine for the express purpose of giving the respondent an opportunity to avail itself of the new regulations. The 14 citations which were "conferenced" that day had not previously gone through MSHA's normal and routine assessment procedure, and under the newly promulgated Part 100 procedures, mine operator's were given the opportunity to avail themselves of the new procedures. MSHA's counsel conceded that this was in fact the case (Tr. 61).

Although MSHA's counsel conceded that Inspector McNece went to the mine on May 24, 1982, for the specific purpose of giving the respondent an opportunity to take advantage of the newly promulgated Part 100

assessment procedures, he maintained that the "conference" which took place that day was not an "assessment conference" (Tr. 62). At the hearing, counsel argued that what Mr. McNece did was "something we didn't need to do, but that we did for their benefit and that it was perfectly consistent with the new process" (Tr. 63). Counsel argued that the "conference" conducted by Mr. McNece "would be a part of the inspection that had not been formalized as part of the inspection before" (Tr. 63).

I conclude and find that MSHA's newly promulgated Part 100 Civil Penalty Assessment regulations are for the express purpose of facilitating an initial administrative determination for proposed assessment of civil penalties under Sections 105 and 110 of the Act. I further find and conclude that the regulatory language found in Section 100.6(a), affording "all parties the opportunity to review with MSHA each citation and order issued during an inspection" is part and parcel of MSHA's assessment procedures, and while MSHA has seen fit to administratively characterize it as a "conference" or "close out conference" in its policy memorandums for purposes of Part 100, on the facts of these proceedings, I conclude and find the so-called "conferences" held by the inspector's in these cases were in fact assessment conferences incident to MSHA's civil penalty assessment authority under sections 105 and 110 of the Act.

With regard to MSHA's policy memorandums, aside from the fact that they are not binding regulations promulgated through statutory rule-making, they are simply attempts to administratively clarify the rights of the parties with respect to the review of citations and orders for purposes of civil penalty assessment determinations under Part 100, as distinguished from any statutory rights afforded miners participation in the actual physical inspection of a mine under section 103(f). Further, I can find nothing in those policy memorandums to support MSHA's attempts to expand or amplify anything other than the rights of the parties under section 100.6 to review citations and orders for purposes of civil penalty assessments. The memorandums are totally devoid of any information concerning the compensation rights of miners for their review participation, either on or off mine property.

With regard to the Secretary's Interpretative Bulletin, it simply establishes and refines the statutory right given miners pursuant to section 103(f) to accompany an inspector during his physical inspection of the mine at no loss of pay for the time spent on the inspection, and it is totally devoid of any references to the type of participation incident to the review of citations and orders found in section 100.6. While it is true that the Bulletin states that it is not intended to address every conceivable issue or factual situation that could arise in connection with section 103(f), it is absolutely silent on any of the issues raised in these proceedings. As a matter of fact, the only mention of "pre- or post-inspection conference" participation rights by a representative of miners is in the introductory statement, and it is limited to a citation to the language found in section 103(f). I REJECT MSHA's assertion that the principles included in this Bulletin support its position in this case that the "conferences" which took place in the cases at hand are covered by the statutory language of section 103(f).

After careful consideration of the arguments presented by the parties in these proceedings, I conclude that SOCCO's arguments with regard to the statutory differentiation between the Secretary's authority to conduct mine inspections and to assess civil penalties for violations which flow from those inspections are valid, and I reject the assertions advanced by MSHA and the UMWA to the contrary. I conclude further that the authority for the Secretary's promulgation of the Part 100 assessment regulations comes from his enforcement and assessment authority found in sections 105 and 110 of the Act, and not from section 103. Although the statutory and regulatory scheme for enforcement of the Act gives a representative of miners a right to participate in the Secretary's enforcement efforts, those rights must be based on some valid statutory or regulatory authority. In my view, the right of a representative of miners to participate in the kinds of mine inspections contemplated by section 103 of the Act by accompanying the inspector during his on-site mine inspection comes directly from section 103. Conversely, the right of a representative of miners to participate in the review of citations and orders for assessment purposes flows from Part 100, the regulatory implementation of the authority of the Secretary to assess civil penalties under sections 105 and 110, well after the mine inspection, and the fact that MSHA has administratively decided that these reviews are to be held at the mine site for administrative convenience does not cure the statutory distinctions addressed by SOCCO.

The post-inspection conference held by an inspector immediately after his inspection rounds afford all parties an opportunity to address safety and health concerns resulting from that inspection, and they are important in that with all parties present when the facts and circumstances are fresh at hand, they can explore ways to correct the conditions and to achieve immediate, or reasonably immediate, abatement and compliance. On the other hand, the types of reviews which took place in these cases, well after the fact of violation and abatement, and with different personalities participating, accomplished nothing more than affording the operator an opportunity to avail himself of the new Part 100 assessment procedures, and in particular, it afforded the mine operator an opportunity to review MSHA's newly promulgated assessment guidelines for differentiating between a "significant and substantial" violation, as opposed to one which is not.

On the facts presented in these proceedings, I conclude and find that the participation by the miner representatives at the meetings or "conferences" which gave rise to the citations which were issued in these cases was participation incident to the civil penalty assessment process being conducted at that time by MSHA under section 100.6(a). This citation-review-participation by the miner representatives in question was clearly limited to, and an integral part of, the regulatory civil penalty assessment process encompassed by Part 100 of the Secretary's regulations. In these circumstances, I find no regulatory authority requiring the mine operator to pay or otherwise to compensate the miner representatives who participated

in this review process. Therefore, I conclude that the mine operator was under no obligation to pay those representatives for the time spent during this review.

In view of my prior findings and conclusions concerning the distinctions to be made in the section 103(f) "post-inspection conferences" incident to mine inspections conducted pursuant to section 103(a), and the types of "conferences" which took place in these proceedings pursuant to Part 100. I further find and conclude that any statutory compensation rights afforded a representative of miners by section 103(f) for his participation in mine inspections as defined and limited by section 103(a) do not apply to the Part 100 review "conferences" in question, and that those so-called "conferences" were not the type of compensable "post-inspection conferences" contemplated by section 103(f). Accordingly, I cannot conclude that the mine operator in these proceedings had any duty under section 103(f) to compensate them for their participation.

Conclusion and Order

In view of the foregoing findings and conclusions, I conclude that the contestant has not violated the provisions of section 103(f), and Citation No. 1225640, 1225641, and 1225867 ARE VACATED, and the contests ARE GRANTED.

George A. Koutras
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

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APR 20 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No. SE 82-48 A.O. No. 01-00722-03034 V
v.	:	Shannon Mine
BLACK DIAMOND COAL MINING CO., Respondent	:	

DECISION

Appearances: George D. Palmer, Associate Regional Solicitor, U.S. Department of Labor, Birmingham, Alabama, for the petitioner; Barry V. Frederick and Harry L. Hopkins, Esquires, Birmingham, Alabama, for the respondent.

Before: Judge Koutras

Statement of the Proceeding

This proceeding concerns a proposal for assessment of civil penalties filed by the petitioner against the respondent pursuant to section 110(a) of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. 820(a), charging the respondent with two alleged violations issued pursuant to the Act and the implementing mandatory safety and health standards. Respondent filed a timely answer in the proceedings and a hearing regarding the proposal was held on February 1, 1983, in Birmingham, Alabama, and the parties appeared and participated therein. The parties waived the filing of post-hearing arguments, were afforded the opportunity to make arguments on the record, and those arguments have been considered by me in the course of this decision.

Applicable Statutory and Regulatory Provisions

1. The Federal Mine Safety and Health Act of 1977, P.L. 95-164, 30 U.S.C. § 801 et seq.

2. Section 110(i) of the 1977 Act, 30 U.S.C. § 820(i).

3. Commission Rules, 29 CFR 2700.1 et seq.

Issues

The principal issues presented in these proceedings are (1) whether respondent has violated the provisions of the Act and implementing regulations as alleged in the proposals for assessment of civil penalties filed, and, if so, (2) the appropriate civil penalties that should be assessed against the respondent for the alleged violations based upon the criteria set forth in section 110(i) of the Act.

In determining the amount of a civil penalty assessment, section 110(i) of the Act requires consideration of the following criteria: (1) the operator's history of previous violations, (2) the appropriateness of such penalty to the size of the business of the operator, (3) whether the operator was negligent, (4) the effect on the operator's ability to continue in business, (5) the gravity of the violation, and (6) the demonstrated good faith of the operator in attempting to achieve rapid compliance after notification of the violation.

Additional issues raised by the parties in the course of these proceedings are identified and disposted of in the course of my findings, conclusions, and rulings made in

Discussion

The citations in question in this proceeding were issued by MSHA Inspector Milton Zimmerman during the course of inspections at the mine on November 12 and 16, 1981. Both citations (withdrawal orders) were issued pursuant to section 104(d)(1) of the Act, and in both cases Mr. Zimmerman made findings that the conditions or practices cited as alleged violations were "significant and substantial". Mr. Zimmerman articulated these "S & S" findings by marking the appropriate "block" on the face of the citation forms which he served on the respondent at the conclusion of his inspections. Citation No. 0758739, issued on November 12, 1981, cites a violation of 30 CFR 75.400, and the alleged violative conditions or practices are described as follows:

> Loose coal was allowed to accumulate under and along the 1st South Belt line for a distance of more than 400 feet. The accumulation was 1 foot to 4 feet 7 inches deep and 4 feet to 10 feet wide where the belt crossed the track. The accumulation of float dust and coal dust was 10 inches deep and 20 feet wide for 80 feet. The accumulation was up to the return belt and idler rollers for the distance of the belt. This belt is inspected by the foreman on two shifts each day.

Citation No. 0758127, November 16, 1981, cites a violation of 30 CFR 75.200, and the alleged violative conditions or practices are described as follows:

> On the 1st South Section the crosscut between the No. 1 left and 2 left entry was 28 feet wide and an area of roof 8 feet wide and 14 feet long was unsupported. The face of the No. 2 left had been advanced 15 feet deep. The mouth of the No. 2 left face was 22 feet wide for a distance of 25 feet. Two posts had been knocked and were not replaced. The entire crew has been traveling through this area for more than a week.
>
> This is in violation of the approved roof control plan. The crosscut between No. 1 and 2 entry was to be only 20 feet wide. The room entry is to be a maximum of 20 feet.

Both citations in issue in this case are "unwarrantable failure" withdrawal orders issued by Inspector Zimmerman pursuant to section 104(d)(1) of the Act. The instant civil penalty case did not arise from a direct challenge or notices of contests filed by the respondent concerning the validity of the two section 104(d)(1) orders of withdrawal which are the subject of petitioner's civil penalty proposals. Although respondent had a right to file timely challenges contesting the validity of the orders pursuant to the statutory scheme of enforcement concerning the "unwarrantable failure chain", it did not do so. Section 105(d) of the Act allows a challenge to such orders, but only if the contest is filed within 30-days of the receipt of the order. On the facts of this case, one of the orders was served on the respondent by Inspector Zimmerman on November 12, 1981, and the other was served on November 16, 1981, and there is no evidence that the respondent filed its notice of contest challenging those orders within the 30-day period required by section 105(d). Respondent's "contest" came on when it was served with a copy of MSHA's proposed civil penalty "special assessments" for the violations detailed in the orders, and this was apparently done on June 1, 1982, when the respondent advised MSHA that it wished to contest three of the five citations which were the subject of the proposed assessments.

At the beginning of the hearing held in this case, the parties began discussing certain proposed stipulations and agreements, including certain references to the "underlying section 104(d)(1) citation", whether there was an "unwarrantable failure" to comply, and whether the citations were "significant and substantial". Since it was obvious to me that the respondent may have believed that the parameters of the hearing would include issues touching on the validity of the unwarrantable failure findings made by the inspector, as well as his "significant and substantial" findings, the parties were afforded an opportunity to be heard on these preliminary matters. During the course of these discussions on the record, counsel for the parties expressed agreement with my ruling that the parameters of the instant civil penalty case would not include questions concerning the validity of the orders (Tr. 15, 17-18, 22, 23). To the extent that respondent's counsel may still be under the impression that he would be permitted to go into the question of the validity of the section 104(d)(1)

citations in this civil penalty proceeding, my ruling that his failure to contest these issues within the time frames permitted by the Act and the Commission's rules is hereby reaffirmed, and any exceptions taken to this ruling by the respondent is preserved for any appeal rights he may wish to exercise on this issue.

The petitioner's proposal for assessment of civil penalties filed in this matter was docketed with the Commission on July 6, 1982. Included with this initial pleading were certain documents labeled "Exhibit A", which purportedly listed the alleged violations which were contested by the respondent and which formed the basis for the petitioners civil penalty proposals. One of the documents listed citations 0758739, 11/19/82, 75.400, showing a penalty assessment of $750, and citation 0758127, 11/16/82, 75.200, with an assessment of $500 indicated. A second document is an MSHA "Proposed assessment" form listing five citations, including 0758739 and 9758127, for which civil penalties totalling $2500 were assessed. Also included as attachments are copies of the two citations/orders, 0758739 and 0758127, and copies of miscellaneous correspondence.

The certificate of service attached to the petitioner's penalty proposals were served by certified mail on the respondent's President, C. B. Blair, on July 1, 1982. By letter dated July 29, 1982, and docketed with the Commission on August 2, 1982, respondent's counsel filed an answer to the petitioner's civil penalty proposals, and the answer states in pertinent part as follows:

> The proposed assessment is an error as a matter of fact, no violation occurred, and the proposed fine did not follow the statutory guideline for assessment.

In view of the contradictory information contained in the petitioner's civil penalty proposal, I issued an Order on August 12, 1982, directing the petitioner to clarify its proposal. Petitioner responded and asserted that the respondent contested only citations 0758127 and 0758739. However, petitioner submitted a copy of MSHA's "Narrative findings" covering five citations and these included one section 104(d)(1) citation and four section 104(d)(1) orders.

On September 3, 1982, respondent filed an amendment to its answer and requested a hearing on MSHA's civil penalty proposals. At no time has the respondent's answers indicated any request for a review of the inspector's unwarrantable failure findings, his "S&S" findings, or the legality of the withdrawal orders, including the section 104(d)(1) "unwarrantable chain".

At the hearing, petitioner's counsel asserted that he had no information that the respondent ever filed a notice of contest pursuant to section 105 of the Act challenging the inspector's "unwarrantable failure" findings, his "significant and substantial" findings, or the inspector's actions in issuing the withdrawal orders. Further, petitioner's counsel

asserted that he had no information that the respondent ever challenged or otherwise sought to contest the underlying section 104(d)(1) citation No. 0758737, issued by the inspector on November 12, 1981, and that the respondent paid the civil penalty assessment in that case. This citation concerned another coal accumulations violation of section 75.400, and respondent's witness Paul Province confirmed that the respondent paid that citation because it could not rebut the inspector's findings concerning the existence of float coal dust in the area cited by him in that citation. In short, the respondent apparently paid the civil penalty assessed for that citation after making a judgment that the citation could not successfully be defended at a hearing.

The respondent did not dispute the fact that at the two locations described by the inspector on the face of the citation in the instant case that the width of one entry at a crosscut was 28 feet, and the mouth of the face area at the second location was 22 feet wide. Further, the respondent did not dispute the fact that at those two locations the roof was unsupported. The first area of unsupported roof was at the location of the 28 foot wide entry, and the inspector observed a roof area 8 feet wide and 14 feet long which was not roof-bolted or otherwise supported. The second location of unsupported roof was at the location where the mouth of the face was 22 feet wide and the inspector observed two posts which had been dislodged and not vertically in place where they were supposed to be.

MSHA's testimony and evidence - Citation No. 0758739, 30 CFR 75.400

MSHA Inspector Milton Zimmerman confirmed that he conducted an inspection at the mine on November 12, 1981, and issued the citation for coal assumulations. He described the conditions which he observed, and he believed that the conditions had accumulated over four or five production shifts prior to the time and date of his inspection. He confirmed that the mine superintendent advised him he was working "shorthanded" and had no personnel available to clean up the cited coal accumulations (Tr. 24-29; 45).

On cross-examination, Mr. Zimmerman confirmed that company representative Paul Province was with him during his inspection, and he testified as to the depth and extent of the accumulations which he cited, and confirmed that at some locations rock was under the coal, but at other locations, such as the area inby the track and the tail piece, the accumulations were coal. He described the accumulations as "damp", and confirmed that at "the area around the piles" there was an accumulation of water (Tr. 32). In response to a question as to whether he walked the entire 400 feet of belt as described in his citation, he answered that "I did walk the belt line", and he was sure that Mr. Province was with him when he did this (Tr. 33). He believed the entire length of the belt line was more than 400 feet, and he confirmed that the accumulations he described in the citation extended the entire 400 feet in question (Tr. 34).

Mr. Zimmerman confirmed that he cited an "S&S" violation, but indicated that under MSHA's "new instructions" for "significant and substantial"

he would not now consider the accumulations to be "S&S" (Tr. 34). He saw no evidence of anyone working on the belt line at the time he issued the citation, and he believed that the coal accumulations were combustible (Tr. 35). He confirmed that the belt line was equipped with fire sensors and alarms, but his concern was over the fact that had the accumulations been allowed to remain there was "a chance of combustion". However, he saw no evidence of any frozen or overheated belt rollers or motors (Tr. 36).

Referring to a sketch of the scene (exhibit P-1), Mr. Zimmerman described the areas where he believed the coal accumulations in question existed at the time the citation was issued (Tr. 37-41). He confirmed that the section was in production when he was there, and that the belt was in operation (Tr. 44). He checked the preshift examination books, and found no notations reflecting the presence of any coal accumulations. Abatement was achieved by cleaning up the accumulations and rock dusting the affected area (Tr. 46). The accumulations were shoveled onto the belt and taken away, and he confirmed that he determined the depths of the accumulations by measuring them with a tape (Tr. 27). He was satisfied that the operator addressed the problem immediately by beginning clean-up (Tr. 48).

Respondent's testimony and evidence

Paul Province, underground foreman, confirmed that he accompanied Inspector Zimmerman during his inspection on November 12, 1981, and while he indicated that the belt distance which was cited was 400 feet, he confirmed that he only accompanied the inspector for 150 feet of the belt line. He confirmed that the total distance of belt line which he actually walked and could visually observe was approximately 220 feet (Tr. 53). While he was aware that Mr. Zimmerman wrote up tne entire 400 feet of belt line for coal accumulations, he stated that Mr. Zimmerman told him "if this part of it looks like this, I know the rest of it needs to be cleaned up" (Tr. 53).

Mr. Province stated that most of the cited materials under the belt line was either rock, or fire clay, or coal mixed in with this material. He described the materials under the belt idlers as "muck", and indicated that the fire clay from the coal seam was mixed in with this material. He confirmed that when he grabbed a handful of the material and squeezed it through his fingers "it will run out to the side of your fingers. That's how wet it was" (Tr. 54). He confirmed that union representative Robert Perry was with him when he picked up this material to test it (Tr. 54). Mr. Province described the remaining material along the belt line as 80% rock, that it was wet to the consistency of mud, and he confirmed that one man was assigned at the start of the shift to clean up the accumulated materials (Tr. 56).

Mr. Province described exhibit R-1 as a weekly map of the section which was cited, and he described the amount of rock which was present in the coal seam which was being mined at the time of the inspection

(Tr. 55-69). When asked whether he disputed the fact that accumulations of coal were present on the cited belt line, he responded "enough to cause a problem, yes, sir, I dispute that" (Tr. 69). Although he insisted that 80% of the accumulations was rock, he conceded that the remaining 20% was coal (Tr. 70). However, he also believed that the violation was improper because that 20% of coal was wet and mixed with fire clay, and therefore would not burn (Tr. 70). Mr. Province stated that he discussed this with the inspector, and that the inspector observed a man shoveling the rock and muck material onto the belt (Tr. 71).

Mr. Province conceded that it was possible that Inspector Zimmerman walked the belt alone beyond the 150 feet after he left him to inform the section foreman to shut the section down (Tr. 72-73). He conceded that he went to the area beyond the 150 feet location, and that he observed a "small accumulation", but that it was wet (Tr. 73). Mr. Province confirmed that he was not in the area when the citation was abated and terminated (Tr. 74). He also confirmed that he did observe float coal dust and coal dust in the middle of the track where the belt crossed the track, and he conceded that Inspector Zimmerman was correct when he cited these accumulations. In response to bench questions concerning the conditions cited by Inspector Zimmerman, Mr. Province testified as follows (Tr. 77-79):

> JUDGE KOUTRAS: I want you to tell me, does the Inspector not cite, as part of the conditions here, the fact that he thought he saw some float coal dust?
>
> THE WITNESS: Yes, sir. He says, "Float dust, and coal dust".
>
> JUDGE KOUTRAS: Okay. Did you see any float dust, or coal dust?
>
> THE WITNESS: Yeah, of that minute quantity that you're talking about, around the belt structure.
>
> JUDGE KOUTRAS: Did you see any float coal dust, at all, that day that he issued the Citation?
>
> THE WITNESS: Yes, sir. I saw some float coal dust, yes, sir.
>
> JUDGE KOUTRAS: Okay. Did you see coal dust?
>
> THE WITNESS: A small amount in the track, yes, sir. In the middle of the track, where the belt crosses the track.
>
> JUDGE KOUTRAS: So, you saw some coal dust, and you also saw some float coal. So, he's not wrong on that, is he?

THE WITNESS: No. No, sir, on that part of it he is not wrong.

JUDGE KOUTRAS: But you are quibbling over the extensiveness of the cite?

THE WITNESS: Yes.

* * * * * * * * * *

JUDGE KOUTRAS: . . . So, your testimony is, regardless of whether it was rock or coal, you saw some accumulations, you saw some float coal dust, and you saw some coal dust accumulated along this belt line.

THE WITNESS: Yes, sir.

JUDGE KOUTRAS: And your contention is that the coal that you saw was incombustible, because you squeezed it, and water came out of it, okay? Is that right, so far?

THE WITNESS: Essentially, yes, sir.

Robert Towry, respondent's Director of Safety and Plant Engineering, testified that he went to the First South Belt section of the mine on the morning of November 12, and for the first 100 to 150 feet he observed "a pretty good pile of slabby rock" (Tr. 87). He also observed "a lot of wet coal, and the pyramiding effect behind the belt wiper". He estimated that 75 to 80% of the accumulated material was rock and that the rest was wet fire clay, and he determined that it was wet by touching it at two or three places, and he sampled the material (Tr. 88). He stated that the coal being mined was a coking coal rather than a steam coal, and that "its not very easy to set it on fire" (Tr. 89). As for the extent of the accumulations which he observed, he stated as follows (Tr. 90-91):

Q. Okay. Now, the portion that Paul says the Inspector did not walk, what was there?

A. There was no accumulation, anything like what was in, say, from the track to just in by the overcast, or say, 150 to 200 feet. It more or less petered out, and there was -- I've never seen a coal mine where it was completely clean, but it was a wet area under that belt, and just a minimal amount of accumulation of any kind. Some rock, and some coal.

Q. All right. I will just ask you a couple of general questions. Why did you decide to contest this Citation, or this Order?

A. We considered that there were certain things in the -- (pause) --

Q. Did you feel there was a violation?

A. No, no, because we considered that the vast majority of this material was incombustible, to start with -- in other words, rock. And then that which could be argued to be combustible -- in other words, coal -- was too wet to have, you know, burned. It was just sopping wet.

Q. Did the description in the Citation, have any effect on your decision?

A. Yes. That and the Inspector's back-up sheet, and also the narrative which accompanied the original assessment, which, by the way, was $1,000 and not the either $750, or $500, that was mentioned earlier. Yes, it would be what we considered inaccuracies on these documents that we really wanted to contest, you know, rather than the fine.

Mr. Towry confirmed that the mine does not liberate methane, and he confirmed that he was not with the inspector when he issued the citation, but that he did go to the area approximately 45 minutes later and the conditions had changed since clean-up had begun (Tr. 96-97).

David Hatter, section foreman, testified that he was involved in the clean-up and rock dusting of the cited belt in question, and he described the material as "mostly mud" and "wet" (Tr. 100). He confirmed that his clean-up was limited to a 70-foot area at the cross-cut, and stated that the material was shoveled onto the belt (Tr. 101-102). He confirmed that the day shift had already cleaned up the other belt area, and that his clean-up was confined to the crosscut, and that his crew began rock-dusting the whole belt line while waiting for the inspector to come back "to get the belt okayed" (Tr. 103).

Inspector Zimmerman was recalled by the petitioner, and he stated that the accumulations in question could have been 30 to 50% rock, but that there was a substantial amount of coal accumulations (Tr. 105). most of the rock which he observed was located from the track inby towards the discharge point where rock had been shot out to install the belts. He also confirmed that had all of the accumulations been rock, he would not have issued the citation (Tr. 106). No samples were taken because he is not required to take samples to substantiate an accumulations

citation. In the instant case, the accumulations looked like coal to him and coal is combustible. Although the law makes a distinction between anthracite and bituminous coal, MSHA does not distinguish between coking coal and steam coal (Tr. 107).

Mr. Zimmerman conceded that it was possible that he did not walk the entire 400 feet of belt line, and after issuing the citation he later modified it to permit production to continue so that the belt would not be stopped at the transfer point (Tr. 109). He did this after determining that a substantial amount of the accumulations had been cleaned up the same evening that he issued the citation, and he terminated the citation four days later after returning to the mine. He confirmed that the accumulations were consistent along the entire area he cited, and even if the accumulations were half coal and half rock, there would still be a violation (Tr. 112).

Mr. Zimmerman could not recall seeing anyone in the process of cleaning the area at the time of his inspection, and he indicated that had he seen clean up going on he would not have issued the citation (Tr. 115). He confirmed that some of the muck was wet and not combustible, but it was still an accumulation which had to be cleaned up (Tr. 116).

MSHA's testimony and evidence - Citation No. 0758127, 30 CFR 75.200

Inspector Zimmerman confirmed that he issued the citation in question during an inspection conducted on November 16, 1981, and he described the areas where he found wide places and unsupported roof (Tr. 148-150). He confirmed that the roof control plan, exhibit P-2, provided for maximum widths of only 20 feet at crosscuts and entries (Tr. 151). He indicated that the problems could have been taken care of by installing timbers to narrow the areas down to the 20-foot width requirements, and he could remember no roof bolt machine being in place at the cited locations, but that one could have been "within a couple of crosscuts of the area" (Tr. 154). He was certain that people were working in the areas and that mining was taking place (Tr. 155).

Mr. Zimmerman testified that there was a danger of a roof fall in the cited areas and that "a couple of rock falls were noted close to this area, on the mine map" (Tr. 155). He confirmed that he observed two posts lying near the mouth of the entryway which was cited, and that the roof control plan requires that any posts knocked down be reinstalled (Tr. 156).

On cross-examination, Mr. Zimmerman confirmed that he probably was at the area cited during his previous inspection of November 12, and had he noticed the wide places at that time he would have cited them. He confirmed that he had no way of knowing when the conditions first occurred, but conceded that someone may have told him that they had occurred at the end of the night shift before his inspection (Tr. 159). He believed the two timbers must have been in place on the 12th or he would have cited them, confirmed that rib rolls were not unusual in the mine, and he conceded that after pointing out the conditions to the respondent, someone may have mentioned the fact that a roof bolting machine was on its way to bolt the roof (Tr. 160).

Respondent's testimony and evidence

Paul Province testified that he did not take issue with the inspector's description of the wide areas, the unsupported roof area, or the fact that two posts had been knocked down (Tr. 170). He stated that a rib roll occurred at the end of the previous evening shift prior to the inspector's arrival on the section, and that prior to this time the crosscut widths were in conformance with the roof control plan (Tr. 171). He also indicated that prior to the rib roll, there were no areas of unsupported roof, and any such areas which had not been cleaned up could not be considered unsupported until they were in fact cleaned up (Tr. 174). He testified that the day shift cleaned up the roll, but since there were two to three shuttle cars of materials, and no one could walk through the area, clean up couldn't start until about 8:30 a.m. (Tr. 176).

Mr. Province stated that after learning of the violations the bolting crew was taken from the One-Left section and moved to the cited area to bolt the roof, and the crew had advised him that the area would have bolted "on cycle". At the time he was made aware of the violation, the bolting crew was located about 50 feet away, but a line curtain may have obstructed the inspector's view of the crew (Tr. 181). According to the bolting crew, they intended to roof bolt the unsupported roof area even before he was made aware of the violation (Tr. 181).

On cross-examination, Mr. Province discussed the mining cycle as it progressed at the time the violation was cited by Inspector Zimmerman, and he conceded that the roof conditions were "not the best nor the worst" (Tr. 186). He conceded that he was not present at the time of the rib roll to see how much of the rib had fallen off (Tr. 189-190). He confirmed that the inspector measured the wide places as reflected on the face of his citation, and that he measured from one rib to the point on the other rib where the roll had occurred, and that it in fact measured 28 feet wide (Tr. 195-197). He confirmed that this distance was eight feet wider than permitted under the roof control plan (Tr. 197).

Mr. Province conceded that the other wide place cited, namely the 22 foot area, was also present, and he indicated that the same rib roll also affected that wide area (Tr. 206). He stated that the two timbers cited were installed to take care of the wide area, but that they must have been knocked down by the rib roll or while clean-up was taking place. He conceded that the initial 22-foot wide area was apparently created by driving the entry too wide (Tr. 207). He did not dispute the inspector's finding that the two timbers were lying down and not in place (Tr. 208).

David Hatter, testified that he was the section foreman on the evening shift when the rib roll occurred on November 15, 1981, and he confirmed that it occurred at approximately 10:40 p.m. He stated that

he had no time to clean it up because it would have necessitated keeping men over on overtime. He told the fire boss about the condition, and indicated that no one could walk under the unsupported roof where the rib had rolled because the coal was five feet deep where it had rolled off the rib and no one could walk around the area (Tr. 221). To his knowledge, no one walked under the unsupported roof as the crew left the section (Tr. 222). Prior to the rib roll, the roof was not unsupported (Tr. 223).

Inspector Zimmerman was recalled, and testified as follows concerning the rib roll (Tr. 231-235):

> Q. You have heard the testimony of Respondent's witnesses here with regard to the prior knowledge of this condition. Is there anything you can tell me about this? Elaborate on it? Did you have any conversation with anybody from management? Did they explain to you that they were aware of the fact that they had had a rib roll, that they had cleaned the rib roll up, and that they were waiting for the normal roof bolt cycle to come in that area to take care of the unsupported roof, at the 28 foot distance that you had noted on the face of your Citation?
>
> A. Something like that might have been said. I can't be positive.
>
> Q. What do you mean, it might have been said? I mean, do your notes reflect that?
>
> A. No, my notes don't reflect it. That was in 1981, and we might have discussed the fact that maybe it was possible that a rib had rolled off, and causing the place to be wide --
>
> Q. What does your narrative statement -- Did you fill out a narrative statement on this Citation.
>
> A. I'm sure I did.
>
> Q. An Inspector's statement?
>
> A. I'm sure I did.
>
> Q. Do you have that available?
>
> A. Whatever was discussed at the time of the violation, wasn't sufficient for me not to write it.
>
> Q. Well, but that's not, you know --

MR. PALMER: Your Honor, here's a copy of that --

JUDGE KOUTRAS: Let me see that for a minute.

MR. PALMER: Okay.

JUDGE KOUTRAS: Let the record show that I have asked for the statement, and Mr. Palmer has produced it for me.

BY JUDGE KOUTRAS: (Resuming)

Q. Would you look at that statement, again? Is that the narrative statement that you filled out with respect to this violation.

A. (Witness examines document.) Yes, sir.

Q. Okay.

JUDGE KOUTRAS: Have you had an opportunity to see this, Mr. Frederick?

MR. FREDERICK: Yes.

BY JUDGE KOUTRAS: (Resuming)

Q. Your remarks on this, and let me just quote them here:

"This crosscut had been mined several weeks ago, and appeared to have been left too wide. The section had been -- has been back in this area for approximately two weeks, and have been travelling this area daily. This area is preshifted three times a day, and the on-shift is made by the foreman twice daily, this condition being examined five times daily . . ." -- and I can't make out the rest of that.

The gist of this is -- Do you now recall any conversation with anybody in mine management, about their explaining to you the circumstances under which this area was left unsupported.

A. Yeah. Well, I recall it, but it had to be more than 20 feet wide already, because of where the rib roll was. It had to be more than 20 feet wide, for it to be 28 feet wide, because the bolts were approximately five feet from the rib already, and it was only eight feet from the bolt to the rib, so it had to be at least 25 feet wide already. Before the rib roll even.

Q. What if mine management had told you at that point in time, that they were aware of the rib roll, that they knew that the entry was wide, but someone was going to get on it right away, and they are on their way, but you just beat them to the punch.

What if they had told you that, and you specifically remembered that? What action would you have taken? Would you have done anything different?

A. By virtue of the fact that they all had gone into the section, and travelled through that area, I would have given them a Citation, because they should have corrected it, prior to them going through.

Q. I believe you testified earlier that if you had noticed a violation previous to that date, you would have written them up on the width violation.

A. I sure would have. Had I measured it and found it to be wide, I would have. Definitely.

Q. And I believe you testified initially on this violation, that you did not know when the width violation first occurred.

Is that your testimony in the record?

A. I didn't know. I didn't know. I don't know when it first occurred.

Findings and Conclusions

Fact of Violation - Citation No. 0758739, 11/12/81, 30 CFR 75.400

Respondent is charged with a violation of mandatory safety standard section 75.400, which provides as follows:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein.

Respondent's defense to the accumulations citation is based on Mr. Province's testimony that what he saw was primarily an accumulation of rock and wet muck which he believed to be incombustible. However, Mr. Province only walked 150 feet of the belt line, and he confirmed the presence of float coal dust and coal dust in the middle of the track and on the belt structure itself. He conceded that Inspector Zimmerman was correct in the citation of these conditions and he confirmed that he was not present when the conditions were abated.

During the hearing, respondent's counsel asserted that Mr. Zimmerman's narrative description of the alleged accumulations which he cited are "blantently wrong" (Tr. 123). Counsel also raised an issue concerning the alleged failure of Mr. Zimmerman to provide mine management with an opportunity to accompany him on the inspection beyond the 150 feet point after Mr. Province left his company (Tr. 123). Counsel argued that if Mr. Zimmerman advised Mr. Province that he did not need to walk the remaining 250 feet of belt line, one can assume that he did not. If he did, then counsel maintained that he did so with no one from mine management present (Tr. 123).

Mr. Zimmerman testified that at the beginning of the inspection, mine management was advised of his presence and Mr. Province and union walkaround representative Perry accompanied him on the inspection (Tr. 126). Mr. Zimmerman confirmed that at the time he advised Mr. Province that he was going to issue an accumulations citation Mr. Province left the area to make a telephone call "to get some people down to start cleaning on it". At that point in time, Mr. Zimmerman conceded that he had not walked the entire 400 feet of belt line and that he had only reached "at least three crosscuts of it" (Tr. 127). He then indicated that he walked the remainder of the belt line and was sure that the walkaround man was with him, but he was not sure about Mr. Province being present. In any event, no one objected, and management's concern was that he was citing an unwarrantable failure violation (Tr. 128).

In Old Ben Coal Company, 1 FMSHRC 1954, 1 BNA MSHC 2241, 1979 CCH OSHD 24,084 (1979), the Commission held that "the language of the standard, its legislative history, and the general purpose of the Act all point to a holding that the standard is violated when an accumulation of combustible materials exist, "1 FMSHRC at 1956. At page 1957 of that decision, the Commission also stated that section 75.400 is "directed at preventing accumulations in the first instance, not at cleaning up the materials within a reasonable period of time after they have accumulated." See also: MSHA v. C.C.C. Pompey Coal Company, Inc., 2 FMSHRC 1195 (1980), and 2 FMSHRC 2512 (1980).

Turning to the evidence and testimony adduced in this case, I conclude and find that the preponderance of the evidence establishes the existence of accumulations of combustible loose coal, coal dust, and float coal dust as cited by the inspector in this case. Respondent does not dispute the inspector's findings concerning the existence of float coal and coal dust as cited in his citation. Even if I were to accept the respondent's assertion that most of the cited accumulations of loose coal was rock and muck, the fact is that the petitioner has established by credible evidence the existence of accululations of coal dust and float coal dust which had not been cleaned up at the time the inspector observed the conditions. With regard to the accumulations of loose coal, respondent concedes that the inspector was not totally wrong in citing loose coal. Its dipute is over the alleged extensiveness of the accumulations. However, since Mr. Province left the inspector after walking only 150 feet of

the belt line, and was not present during the abatement process, he had no real basis for concluding that what the inspector observed was an accumulation of rock rather than loose coal. Having observed the inspector on the stand during the course of his testimony, I find him to be a credible witness. He described the accumulations he observed, confirmed that he made certain measurements as to their depth and extensiveness, and in my view has supported the existence of the conditions cited.

In view of the foregoing, I conclude and find that the petitioner has established the fact of violation, and the citation IS AFFIRMED. I reject the respondent's assertion that mine management was not given the opportunity to accompany Inspector Zimmerman during his inspection rounds. In this regard, I take note of the fact that the respondent had not previously raised this issue as part of its pleadings filed in this matter. In any event, it seems clear to me that Mr. Province opted to leave the inspector after he had walked the 150 feet of belt line in question for the purpose of initiating abatement. As far as I am concerned, it is clear that for this initial 150 foot distance, management did in fact accompany the inspector, and absent any evidence that it objected to the inspector finishing his inspection rounds without Mr. Province present, I cannot conclude that Inspector Zimmerman acted arbitrarily by continuing to walk the remaining portion of the belt line without Mr. Province being present.

Fact of Violation - Citation No. 0758127, 11/16/81, 30 CFR 75.200

Inspector Zimmerman confirmed that he issued the citation in question because the respondent failed to follow its approved roof control plan in that upon inspection of the cited underground mine he found that certain areas had been driven too wide and lacked the required roof support called for by the approved plan. It is clear that the failure by a mine operator to comply with a provision of its approved roof control plan constitutes a violation of section 75.200, Peabody Coal Company, 8 IBMA 121 (1977); Affinity Mining Company, 6 IBMA 100 (1976); Dixie Fuel Company, Gray's Knob Coal Company, 7 IBMA 71 (1976).

I find Inspector Zimmerman's testimony in support of the cited conditions to be totally credible and believable, and it fully supports the issuance of the citation in question. Respondent's defense goes more to the mitigation of the gravity and negligence of the cited conditions, and its testimony does not rebut the existence of the wide places and unsupported roof areas cited by Inspector Zimmerman. Accordingly, I conclude and find that the petitioner has established the fact of violation by a preponderance of the evidence, and the citation IS AFFIRMED.

Negligence - Accumulations - 30 CFR 75.400 Citation

Inspector Zimmerman testified that he observed the belt line "date board" and it had been dated and initialed, indicating that "the

belt had been made" but that nothing had been done to clean up the accumulations which were present. He also checked the preshift books and the accumulations which were present. Based on his observations of the accumulations and the date board, he concluded that the respondent knew or should have known about the conditions, but did nothing to clean them up prior to his issuance of the violation (Tr. 128). Further, his testimony that the mine superintendent told him that he was working shorthanded and had no personnel available to clean up the cited accumulations remains unrebutted. Under all of these circumstances, I conclude and find that the cited conditions resulted from the respondent's failure to take reasonable care to insure that the cited accumulations were cleaned up, and that this failure on its part constitutes ordinary negligence.

Gravity - Accumulations - 30 CFR 75.400 Citation

While it is true that the respondent began abatement immediately, the fact is that at the time the inspector observed the conditions the belt was running and the section was in production. However, the inspector saw no evidence of any frozen or stuck rollers, and the belt line was equipped with fire sensors and alarms, and respondent's safety director indicated that there was no methane detected on the section. Given these circumstances, and the fact that the accumulations of loose coal were wet, and in some areas mixed in with rock, I cannot conclude that the conditions were grave or extremely serious. As a matter of fact, Inspector Zimmerman candidly admitted that given the same circumstances today, he could not conclude that the cited conditions were "significant and substantial". Accordingly, I have considered these circumstances in the assessment of the penalty for the citation in question.

Negligence - Roof Support - 30 CFR 75.200 Citation

The inspector testified that he could not state how long the unsupported roof areas and wide entries existed before he found them during his inspection on November 16, 1981. However, his "inspector's Statement", exhibit ALJ-1, states as follows under item 2, "Remarks":

> The crosscut had been mined several weeks ago and appeared to have been left too wide. The section had been back on this area for approximately two (2) weeks and have been traveling this area daily. This area is preshifted three (3) times a day and the on shift is made by foreman twice daily. This condition being examined 5 times daily was surely noticed. This was the main intake and escapeway.

When asked to explain or reconcile his "remarks", which clearly imply or infer that the wide places existed for several weeks and were not corrected until November 16, 1981, the inspector stated that his

notes do not reflect any information in this regard, and he again stated that he did not know how long the cited conditions may have existed prior to his arrival on the scene. When asked whether anyone from mine management offered any explanation or excuse for the cited conditions, the inspector confirmed that his notes do not reflect that it did, and he also indicated that "they may have", but he could not remember.

Respondent's counsel asserted that while he does not dispute the existence of the conditions cited by the inspector, his primary concern is over the information used by MSHA in the assessment of the initial penalty for the violation. Specifically, counsel stated that the basis for the inspector's finding that the violation was "unwarrantable" are simply not true, and that the conclusions made by the special assessments MSHA official in his "narrative findings" that "the violation was observable readily and should have been seen during the preshift and on-shift examinations" were obviously based on the erroneous remarks made by the inspector in his "inspector's statement". In short, counsel asserted that this is the reason why respondent chose not to pay the proposed civil penalty and to "contest" the matter by requesting a hearing before this Commission.

Respondent's counsel did not dispute the fact of violation as stated by Mr. Zimmerman in his citation. Counsel pointed out that the rib roll was an "unintentional" roll, and that the conditions were not known to management until the inspector found the conditions and cited them. After that occurred, management took immediate action to abate the conditions. The section foreman who was assigned to the section at the time the citation issued is no longer employed by the respondent, and Mr. Province was not present at the time the area was cleaned up (Tr. 213).

The testimony of David Hatter, the section foreman on the evening shift of November 15, 1981, reflects that the rib roll occurred at approximately 10:40 p.m., at the end of his shift. Although he indicated that he brought it to the attention of the fire boss, he also indicated that men were not assigned to immediately support the roof because it would have entailed paying them overtime.

After careful consideration of all of the testimony and evidence adduced on this citation, I conclude and find that the cited conditions resulted from the respondent's failure to exercise reasonable care to insure that the areas which were too wide were fully roof supported in accordance with the approved roof control plan. I further find that these conditions should have been taken care of when discovered and reported by Mr. Hatter, and the failure by the respondent to correct the cited conditions, which it knew or should have known existed, constitutes ordinary negligence.

Gravity - Roof Support - 30 CFR 75.200 Citation

Respondent contends that due to the extent of the rib roll which caused the wide places, men could not walk through the area due to the piles of coal which were present as a result of the fall. While this may be true, respondent offered no such excuse for the unsupported roof area which was cited because the two roof support timbers were not in place. Insofar as that location was concerned, I find that the cited conditions were serious. As for the unsupported areas where the inspector found were too wide, the fact is that the conditions were permitted to remain between shifts, and the locations of unsupported roof were in fact in an area where miners traveled through, and respondent conceded that a roof bolting crew was working nearby. In these circumstances, I conclude and find that the cited conditions were serious.

Size of Business and the Effect of the Civil Penalties on the Respondent's Ability to Remain in Business.

Respondent conceded that its mining operation is subject to the Act. With regard to the size of its operation, respondent's counsel stated that in 1982 the annual tonnage mined at the mine site in question was 63,877, and that the mine worked 82,526 man hours. For the year 1980, total annual production for the parent company was 164,108 tons, and the mine in question had a production of 145,939 tons for that year, and 145,939 man hours were worked (Tr. 9-10).

I conclude and find that at the time the citations in question here were issued, respondent was a small-to-medium sized mine operator. Further, since respondent offered no evidence to the contrary, I conclude and find that the civil penalties which I have assessed for the two citations in question will not adversely affect the respondent's ability to continue in business.

History of Prior Violations

Petitioner's history of prior violations is reflected in Exhibit P-3, a computer print-out covering the period November 12, 1979 through November 11, 1981. The print-out shows 136 paid citations, eight of which are for prior violations of section 75.400, and five of which are for prior violations of section 75.200. The print-out reflects further that all of these prior citations for violations of sections 75.200 and 75.400 are section 104(a) citations, and none involve imminent danger or other withdrawal orders. Considering the size of the respondent's mining operation, as well as the fact that the respondent has paid in full all of these prior citations, I cannot conclude that its history of prior citations is such as to warrant any additional increases in the civil penalties which I have assessed for the two citations in issue this case.

Good Faith Compliance

The record in this case establishes that the respondent rapidly abated the cited conditions and took immediate corrective action once

the conditions were called to its attention by Inspector Zimmerman, and this has been considered by me in the assessment of the civil penalties for the two citations which have been affirmed.

Petitioner's proposed civil penalty assessments

It is clear that I am not bound by the initial civil penalty assessments proposed by the petitioner as part of its pleadings in this case. However, I take note of the fact that in its initial proposal for assessment of civil penalties filed by the petitioner on July 6, 1982, petitioner proposed a civil penalty in the amount of $750 for Citation No. 0758739, and $500 for Citation No. 0758127. These proposed penalties were the result of MSHA's "special assessment" computations. However, in response to my Order of August 12, 1982, seeking clarification of MSHA's proposals, petitioner filed a letter dated August 24, 1982, and included copies of MSHA's "Narrative Statements" which were not included with its initial proposal. Included in these submissions were proposals for civil penalties in the amount of $1,000 for each of the two citations in question, as well as a copy of the previously filed proposals calling for assessments of $750 and $500.

The obvious confusion resulting from the aforementioned inconsistent pleadings and civil penalty proposals were discussed by me during the course of the hearing (Tr. 21-22). Also discussed was an apparent typographical error in the pleadings which reflected the year of the issuance of the citations as 1982 in one document, and 1981 in another (Tr. 138). No further clarification was forthcoming from the petitioner. Accordingly, I will assess civil penalties which I believe are reasonable and warranted in this case.

Penalty Assessments

On the basis of the foregoing findings and conclusions, and taking into account the requirements of Section 110(i) of the Act, I conclude and find that the following civil penalty assessments are appropriate for the citations which have been affirmed:

Citation No.	Date	30 CFR Section	Assessment
0758739	11/12/81	75.400	$ 650
0758127	11/16/81	75.200	400
			$1050

ORDER

Respondent IS ORDERED to pay the civil penalties assessed above in the amounts shown within thirty (30) days of this decision and order, and upon receipt of payment by the petitioner, this case is DISMISSED.

George A. Koutras
Administrative Law Judge

Distribution:

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES
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FALLS CHURCH, VIRGINIA 22041

APR 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner	:	Civil Penalty Proceeding Docket No: LAKE 80-378-M A/O No: 11-00096-05001
v.	:	Lee Quarry
CHARLES F. LEE AND SONS, INC., Respondent	:	

DECISION

Appearances: Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 So. Dearborn Street, Chicago, ILL 60604, for Petitioner
Clara Chilson, Representative, 1114 Irene Road, Cherry Valley, Illinois 61016, for Respondent

Before: Judge Moore

At the beginning of the trial a number of stipulations were read into the record. The ones I consider important are that this mine is an open pit limestone mine with 8 employees at the time of the inspection working one shift a day 5 days a week. The inspector who issued the 5 citations involved in this case had been a victim of MSHA's reduction-in-force and at the time of his separation his notes had been taken from him and destroyed. This brilliant procedure resulted in the inspector having nothing more than the citations themselves and the inspector's statement to refresh his recollection of physical conditions which he had observed back in June of 1980.

Citation No: 357701 reads "berms were not provided for the dumping ramp that is used by the front-end loader to feed the crushing plant." The inspector's statement regarding that violation adds little, if anything, to refresh one's recollection. The standard allegedly violated 30 C.F.R. 56.9-54 states "berms, bumper blocks, safety hooks, or similar means shall be provided to prevent over-travel and overturning at the dumping location." I think the inspector cited the wrong standard. The standard cited refers to dumping locations and makes no reference to an elevated roadway or ramp. The berms, bumper blocks and safety hooks referred to therein would prevent over-travel but would not prevent any equipment from running off of the side of an elevated roadway. In my opinion 30 C.F.R. 56.9-22 which requires guards on the outer banks of elevated roadways should have been the basis of the citation. While I am sure no prejudice resulted to respondent as a result of the wrong section being cited, I nevertheless think it would be presumptious on my part to amend a citation and penalty proposal without being requested to do so. I am therefore going to vacate citation No: 357701.

The other four citations in this case all involve guarding of pinch points. Government exhibit M-13 is a pamphlet entitled "MSHA's Guide to Equipment Guarding." Various pictures in exhibit M-13 were used during the trial to illustrate the type of guarding violation that the inspector was citing. Respondent's principal objection and reason for contesting these guarding citations was the inspector's alleged failure to point them out on a previous visit. Mrs. Clara Chilson, respondent's daughter, testified that 3 months prior to the issuance of the citations, a compliance assistance visit had been conducted. She thought the inspector was Mr. Joseph Knaff, the same inspector who issued the citations at issue in this case. But even if it was the same inspector and even if he failed to notice or to point out some hazardous condition, it would not insulate the operator from later being issued a citation with respect to that hazard. The purpose of a compliance assistance visit is to help the miner to comply with regulations but there is no guarantee that every violation in the mine will be discovered and discussed.

Citation No: 357702 alleges that adequate guarding was not provided for the pinchpoint created by the V-belt drive of the crusher. It was Inspector Knaff's opinion that the guard was inadequate. He stated.... "if the man was walking toward the screen guard, happened to trip and fall into it, he could get into the pinchpoint, the belts, so I cited them to have the screen raised so that he would have to go over the top rather than almost straight forward to get in to the pinchpoint." (Tr. 26). He did say (Tr. 34) that you would have to have arms three feet long to reach the pinchpoint and I don't know anyone with arms that long. I don't think he meant that however, because the rest of his testimony indicates that if a person slipped he could reach the pinchpoint. I am going to affirm the citation. I find a low degree of negligence inasmuch as the area was guarded, even though inadequately, and because the guard had not been mentioned during the compliance assistance visit. A serious injury could occur but there was good faith abatement and no history of prior violations. I assess a penalty of $30 for this violation.

Citation No: 357703 states that the tail pulley guard on the stacking conveyor needs to be extended to prevent accidental access to the pinchpoint. When Mr. Knaff wrote the citation the adjustment was such that the pinchpoint was not guarded. I find the violation existed and affirm the citation. The penalty criteria were the same for the previous violation and I assess the same penalty, $30.

Citation No: 357704 charges that there was no guard at the tail pulley of the feed conveyor. The standard, 30 C.F.R. 56.14-1 clearly requires guards on tail pulleys. There might be some question about whether the language "which may be contacted by persons, and which may cause injury....." applies to tail pulleys but in this case the pulley was in a position where it could be contacted and if so it would have caused injury. A higher degree of negligence is involved in having no guard at all than that involved in having an inadequate guard. Except for negligence I find the criteria the same as for the 2 previous guarding violations and assess a penalty of $40.

Citation No: 357705 alleges that guarding was not provided for the self-cleaning tail pulley in the lime and chip plant. The inspector testified that a self-cleaning pulley is more hazardous than the regular kind because it has pinchpoints in numerous places. There is a picture of a self-cleaning tail pulley on page 5 of government exhibit M-13. I find a violation occurred and that the hazard is greater when a self-cleaning pulley is left unguarded. The other penalty criteria are the same as in the previous violation but with the hazard being higher. I assess a penalty of $50.

It is therefore ORDERED that respondent pay to MSHA, within 30 days, a civil penalty in the sum total of $150. All citations except 357701 are affirmed.

Charles C. Moore, Jr.

Charles C. Moore, Jr.,
Administrative Law Judge

Distribution: By Certified Mail

Rafael Alvarez, Esq., Office of the Solicitor, U.S. Department of Labor, 230 So. Dearborn Street, Chicago, ILL 60604

Mrs. Clara Chilson, Representative, Charles F. Lee and Sons, Inc., 1114 Irene Road, Cherry Valley, Illinois 61016

FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

333 W. COLFAX AVENUE, SUITE 400
DENVER, COLORADO 80204

APR 25 1983

SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. JAQUAYS MINING CORPORATION, Respondent.	CIVIL PENALTY PROCEEDINGS DOCKET NOS. WEST 80-412-M WEST 81-341-M (Consolidated)

Appearances:

Linda Bytof, Esq., Office of
Daniel W. Teehan, Regional Solicitor
United States Department of Labor
San Francisco, California
for the Petitioner

D. W. Jaquays, Phoenix, Arizona
Appearing pro se,
for the Respondent

Before: Judge John J. Morris

DECISION

The Secretary of Labor, on behalf of the Mine Safety and Health Administration, MSHA, charges respondent, Jaquays Mining Corporation, (Jaquays), with violating safety regulations adopted under the Federal Mine Safety and Health Act, 30 U.S.C. 801 et seq.

After notice to the parties a hearing on the merits was held in Phoenix, Arizona.

The parties waived the filing of post trial briefs.

ISSUES

The issues are whether respondent violated the regulations and, if so, what penalty is appropriate.

In this case petitioner issued his Citation 318288 under the authority of Section 104(a) of the Act. The citation alleges respondent violated Title 30, Code of Federal Regulations, Section 57.3-22. 1/

Petitioner's Evidence

The petitioner's uncontroverted evidence shows the following:

Jaquays, subject to MSHA jurisdiction, owns and operates an underground asbestos mine. Its production at the El Dorado Mine is sold to various purchasers who use the product in several states (Tr. 6, 7). At the time of the inspection Jaquays's mine operated 54,140 man hours annually (Tr. 7).

On May 21, 1980 Clarence Ellis, an MSHA representative experienced in mining, inspected the El Dorado Mine (Tr. 11-14). There were eight or nine employees operating a one day shift (Tr. 14).

Foreman Isidro Cavazos accompanied the inspector when he entered the big stope. 2/ The inspector observed a slab of loose and unconsolidated ground on the right hand rib (wall). This was twenty feet from the drill site (Tr. 16, P2, P3, 19). The slab was three feet long, one and a half feet high, and one foot thick. It had been undercut. The inspector observed a crack in the slab as wide as a finger (Tr. 19-20). On the side of the passageway there was loose muck two and one-half to three feet high (Tr. 18). One miner in the area, about five feet from the face, was setting up a pneumatic drill to start drilling (Tr. 21, 22). A drill, laying in the middle of the walkway, was connected to an air hose (Tr. 22).

The foreman and the inspector directed a miner to scale down the slab. As the miner punched it with a scaling bar it fell "easily" and "pretty much" filled the walkway (Tr. 23, 25).

1/ The cited section provides as follows:

57.3-22 Mandatory. Miners shall examine and test the back, face, and rib of their working places at the beginning of each shift and frequently thereafter. Supervisors shall examine the ground conditions during daily visits to insure that proper testing and ground control practices are being followed. Loose ground shall be taken down or adequately supported before any other work is done. Ground conditions along haulageways and travelways shall be examined periodically and scaled or supported as necessary.

2/ A stope is an area from which ore is extracted (Tr. 16).

The proximity of the loose ground to the passageway accentuated the hazard (Tr. 26). The undercut also contributed to the instability of the slab. Vibration from the drill might have caused the slab to fall (Tr. 27).

Injuries such as broken bones could result if the slab fell and struck a miner. Also the rock fall could have severed the air hose (Tr. 27, 28).

Discussion

The evidence establishes a violation of 30 C.F.R. 57.3-22. Jaquays offered no contrary evidence (Tr. 34).

At the hearing the president of Jaquays contended that the citation should not have been issued because the defective condition was immediately corrected (Tr. 29).

Jaquays's argument is rejected. If a violation exists petitioner is obliged under the Act to issue his citation. Rapid abatement, as here, is an element to be considered in assessing any civil penalties. Such abatement does not constitute a defense to the violation.

The citation should be affirmed.

WEST 81-241-M

In this case petitioner issued two citations under the authority of Section 104(a) of the Act.

Citation 383191

This citation alleges a violation of Title 30, Code of Federal Regulations, Section 57.9-2 [3]/

Petitioner's Evidence

The petitioner's uncontroverted evidence shows the following:

On November 4, 1980 MSHA representative Jack Sepulveda, a person experienced in mining, inspected the El Dorado Mine (Tr. 35-38). Isidro Cavazos, the foreman, accompanied him.

3/ The cited section provides as follows:

57.9-2 Mandatory. Equipment defects affecting safety shall be corrected before the equipment is used.

The inspector observed a Gardner Denver Mucking machine [4]/. It was powered by air and operating on rails. At the time of the inspection it was mucking a previous blast (Tr. 39, 40, 48, P4, P5, P6).

The mucker requires a miner to operate its levers (Tr. 41-42). The mucking machine did not have a step plate on the side where the miner stands to operate the machine (Tr. 49).

The mucker, about three feet high and three feet wide, weighs two to three tons. The rails on which it rests are 18 inches apart (Tr. 46, 47). When sitting on its rails the mucker is three feet above the ground (Tr. 45).

The step plate keeps the mucker from falling on the operator if it jumps the tracks (Tr. 49, P4, P5).

In the inspector's experience it is a common occurrence for the mucker to derail. It usually happens once or twice every blast. An operator's foot can be caught if the mucker does not have a step plate to place the operator in a position of safety. A fracture or a fatality could result if the operator's foot was caught (Tr. 56-59, 62-63).

Discussion

The foregoing evidence establishes a violation of the regulation. Jaquays offered no contrary evidence.

Jaquays contends no hazard exists. Further, according to Jaquays, miners do not like to use the step while mucking (Tr. 60, 61).

I am not persuaded. The hazard is apparent. Inspector Sepulveda, who has had considerable experience in operating a mucker, testified his machine would jump the rail "nearly everyday" (Tr. 62-63). Concerning the second contention: Mere dislike by a miner of a safety device does not constitute a defense for an operator.

Citation 383191 should be affirmed.

4/ A mucking machine removes blasted material from the area so the drilling cycle can continue (Tr. 39, 40, P3).

Citation 383192

This citation alleges a violation of 30 C.F.R. 57.13-21. 5/

Petitioner's Evidence

Petitioner's uncontroverted evidence shows the following:

Jaquays's double hose connection on the main level drift did not have a safety chain (Tr. 63, 65, 66-67, P10, P11). The entire length of the pressurized hose is 100 feet. One length of the double connection goes to the mucker machine in the drift. The other length goes to the compressor (Tr. 65-67).

There was no suitable locking device nor automatic shut off valve at the connection (Tr. 66-67).

The one and a half inch rubber hoses were connected by wing nuts in two female type connectors at the double connection (Tr. 66, 67). A mucker operates on a minimum pressure of 70 pounds per square inch (Tr. 67).

The hazard here occurs if the hoses break loose on the compressor side of the connection. The air pressure then causes the hose to whip around and this could cause possible injuries (Tr. 68). The helper would be in a hazardous position since he would be sitting on the machine (Tr. 69). If a hose breaks an employee in the immediate vicinity wouldn't be able to shut off the air (Tr. 69-70). Inspector Sepulveda experienced this inability on one occasion when a hose broke and he was in a stope (Tr. 69, 70).

A tight hose connection does not prevent the hoses from parting (Tr. 74-75). A mechanical mucker, when operating, is louder than any leaking hose connection (Tr. 75).

Discussion

Jaquays's President indicated that the company accepted MSHA's evidence (Tr. 76).

The facts establish a violation of the regulation. Jaquays argues that no hazard exists and any mucker operator wouldn't permit leaking hoses.

5/ The cited regulation provides as follows:

57.13-21 Mandatory. Except where automatic shutoff valves are used, safety chains or other suitable locking devices shall be used at connections to machines of high-pressure hose lines of 3/4-inch inside diameter or larger, and between high-pressure hose lines of 3/4-inch inside diameter or larger, where a connection failure would create a hazard.

Contrary to Jaquays's position I find a clear hazard exists if the hose connection fails and the hose begins to "whip" around due to the lack of a suitable locking device.

Jaquays's position that no hazard exists because a mucker operator would not permit a leaky hose lacks merit. The operator wouldn't be able to hear the leak above the noise of the mucker (Tr. 75). In addition, there would be no leak for the operator to hear if the mucker was not operating because the machine would not then be using air pressure.

Citation 383192 should be affirmed.

Civil Penalties

Petitioner proposes the following civil penalties for the citations:

Citation 381288	$36
Citation 381191	26
Citation 381192	24

On the issue of civil penalties Jaquays's evidence establishes the following facts:

The company was not in production at the time of the hearing. In fact, the company was broke and lost $100,000 in the last two years (Tr. 77-79).

The mandate to assess civil penalties is contained in Section 110(i) [now 30 U.S.C. 820(i)] of the Act. It provides:

> (i) The Commission shall have authority to assess all civil penalties provided in this Act. In assessing civil monetary penalties, the Commission shall consider the operator's history of previous violations, the appropriateness of such penalty to the size of the business of the operator charged, whether the operator was negligent, the effect on the operator's ability to continue in business, the gravity of the violation, and the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation. In proposing civil penalties under this Act, the Secretary may rely upon a summary review of the information available to him and shall not be required to make findings of fact concerning the above factors.

An operator's financial condition is often given considerable weight in assessing civil penalties. However, in connection with Jaquays's prior history I note that six violations were assessed in the El Dorado Mine in the year prior to November 30, 1980.

In addition, I further note that Citation 383192 (no safety chain on high pressure hose connection) is apparently a twin to the violation by Jaquays of the same standard in a case decided December 16, 1980, Jaquays Mining Corporation, 2 FMSHRC 3625 (1980).

The proposed penalties here are quite small. Considering the statutory criteria I am unwilling to disturb the proposed civil penalties.

Based on the foregoing findings of fact and conclusions of law I enter the following:

ORDER

In WEST 80-412-M and WEST 81-341-M:

1. Citations 381288, 381191, and 381192 and their proposed civil penalties are affirmed.

2. Respondent is ordered to pay the sum of $86 to the Secretary of Labor within 40 days of the date of this order.

John J. Morris
Administrative Law Judge

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FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION

OFFICE OF ADMINISTRATIVE LAW JUDGES

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APR 26 1983

WESTERN SLOPE CARBON, INC., Applicant, v. SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Respondent.	CONTEST OF CITATION PROCEEDING DOCKET NO. WEST 81-150-R Order No. 786185; 12/17/80 MINE: Hawk's Nest East
SECRETARY OF LABOR, MINE SAFETY AND HEALTH ADMINISTRATION (MSHA), Petitioner, v. WESTERN SLOPE CARBON, INC., Respondent.	CIVIL PENALTY PROCEEDING DOCKET NO. WEST 81-286 MSHA CASE NO. 05-00293-03061 MINE: Hawk's Nest East

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For the Operator

Before: John A. Carlson, Judge

DECISION

This case, heard under the provisions of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. § 801 et seq. (the "Act"), arose from a December 17, 1980 inspection of the Hawk's Nest East Mine of Western Slope Carbon, Inc. (Western Slope). On that date Thomas Heuschkel, a federal coal mine inspector, issued an imminent danger withdrawal order under

section 107(a) of the Act. He modified the order on December 24, 1980 to specify that the violation of the float coal dust standard published at 30 C.F.R. § 75.400, charged in the withdrawal order, was also a violation of section 104(a) of the Act. These determinations were challenged by Western Slope's Application for Review which was docketed as WEST 81-150-R. The Secretary's proposal of a civil penalty of $960.00 for the alleged violation was also contested. The Commission docketed the penalty matter as WEST 81-286, which was consolidated for hearing with the earlier matter.

Following a Denver, Colorado hearing, both parties submitted briefs. The jurisdiction of the Commission is conceded by the operator.

REVIEW AND DISCUSSION OF THE EVIDENCE

I

The inspector issued his imminent danger withdrawal order because of what he perceived to be an excessive accumulation of float coal dust in the return entries from a longwall section in the mine. This condition, he charged, violated the mandatory safety standard set forth at 30 C.F.R. § 75.400. It provides:

> Coal dust, including float coal dust deposited on rock-dusted surfaces, loose coal, and other combustible materials, shall be cleaned up and not be permitted to accumulate in active workings, or on electric equipment therein. 1/

The inspector testified that he observed a deposit of "very black" float coal dust "in excess of an eighth of an inch deep" over a distance of about 500 feet in the number 1 and 2 entries, 7 west section (transcript 10-11). The 500 feet in question were between crosscuts 51 and 56, he stated, and the dust accumulation represented a "very explosive condition." He enlarged upon the hazard by explaining that the dust could be put in suspension, and thus made potentially explosive, by any air disturbance in the entries. A roof fall in the gob area behind the longwall face, he said, could release methane and also stir up the dust, creating a situation "... where the slightest spark would set off a tremendous explosion" (Tr. 23). Concerning ignition sources, he testified that two electric motors used to drive the conveyors could generate sparks. The motors, he stated, were located at the tailgate of the conveyor, near the intersection of the longwall face and the entries. Also, according to the inspector, sparks could be generated by the longwall mining machine, or could result from rocks falling on metal machinery during the mining process.

1/ This section duplicates the language of section 304(a) of the 1969 Coal Act.

Inspector Heuschkel also maintained that the presence of methane enhanced the fire and explosion hazard posed by the coal dust. His inspection notes showed readings ranging from .35% to 2% at various points in the area of the entries where the coal dust lay. He also testified that he achieved a reading of 5% (the top of the monitor he was using) in the gob area, behind the longwall face. This area was isolated from work areas by danger boards. The inspector went behind the boards to take the high reading.

The inspector maintained that an explosion of the coal dust, or a combination of the dust and methane, could result in fatal injuries to all miners in the west side of the mine (Tr. 15). The undisputed evidence shows that no miners were in the entries in question, but that a crew was working on the longwall machine, and a total of eight or nine miners were in the general area. None was closer than 300 feet to the coal dust area. (Tr. 32, 50, 64).

Under cross examination the inspector acknowledged that he saw no coal dust in suspension during his inspection, and that he could have been mistaken about the number of motors at the end of the conveyor - there may have been but one. He also acknowledged that the methane readings recorded in his inspection notes were all within acceptable limits under applicable standards. The 5% reading, he admitted, was taken in an area where the operator was not obliged to take readings, and was not recorded in his notes (Tr. 34).

The inspector first maintained that his withdrawal order covered the longwall, but later conceded that it did not. It covered the entries only; work could continue on the longwall.

II

Western Slope presented evidence through Ronald E. Neil, foreman in the area in question, and Ralph Audin, safety director for the mine.

Neil disagreed with the federal inspector about the quantity of coal dust present. He acknowledged that a "gray film" of coal dust was present over rock dust 2/ on the floor. The rock dust, he said, was visible in "most places."

Most of Neil's testimony, however, went to the issue of the likelihood of an explosion (Tr. 51, 55). He stressed that no production was taking place at the time of inspection because the stage loader which feeds the coal to the conveyor was under repair. He substantiated the claim with a copy of his daily report which showed no production of his shift on the date of inspection (Western Slope's exhibit 5). Work on the stage loader took place at the far or headgate end of the conveyor, some 428 feet from the entries cited by the inspector (Tr. 50).

2/ Rock dusting is one of the acceptable methods for abatement of float coal dust hazards. See 30 C.F.R. § 75.402.

Neil also emphasized that there were no ignition sources within the entries in question. The entries contained no machines; and no cables, wires, or other electrical conductors ran through the area. Concerning the motor at the tailgate of the longwall conveyor, Neil testified that it was not operating at the time of inspection because there was no production at the face. Moreover, there was but one motor at the tailgate, not two as indicated by the inspector. He further asserted that methane readings are taken before the belt is started. If the readings exceed 1 percent, start-up does not occur. Beyond that, a detector device installed about 15 feet from the machine automatically "kicks the power off of everything" if the methane level exceeds 2 percent.

Western Slope's safety director, Mr. Audin, did not observe the conditions underground at the time of the inspection. His testimony added little of substance to that of the foreman.

III

Having considered all the evidence, I must conclude that it establishes a violation of 30 C.F.R. § 75.400. The existence of an accumulation of float coal dust was in some dispute, but I find the inspector's evidence on this issue generally credible. Western Slope had a rock dusting program which involved use of a mechanical trickle duster supplemented by hand dusting. Foreman Neil, however, admitted that the trickle duster had not been in operation at the time of inspection, and he was vague about when it last worked. He was also unsure as to when the entries in question were last dusted by any method. Neil did concede the presence of some coal dust, but claimed it was not as thick as the 1/8 inch estimated by the inspector.

In Old Ben Coal Company, 1 FMSHRC 1954 (1979), the Commission made clear that a violation of the standard occurs whenever "an accumulation of combustible materials exists." In doing so it rejected the prior view of the Interior Department's Board of Mine Operations Appeals that the crux of the violation is the operator's failure to clean up an accumulation "within a reasonable time." Later, in a case involving the same operator, Old Ben Coal Company, 2 FMSHRC 2806 (1980), the Commission held that measurements or other precise evidence of the depth or extent of accumulation were unnecessary to show violation. It declared that "... an accumulation exists where the quantity of combustible materials is such that, in the judgment of an authorized representative of the Secretary, it likely could cause or propagate a fire or explosion if an ignition source were present." (Footnotes omitted.) I am convinced that an accumulation existed.

IV

For the reasons which follow, however, I am not convinced that the violative condition constituted an imminent danger. Section 3(j) of the Act defines an imminent danger as:

> The existence of any condition or practice in a coal or other mine which could reasonably be expected to cause death or serious physical harm before such condition or practice can be abated.

The commonly used test for determining the existence of an imminent danger can be found in Old Ben Coal Corporation v. Interior Board of Mine Operation's Appeals, 523 F. 2d 25, 32 (7th Cir. 1975). There the Court said:

> [W]ould a reasonable man, given a qualified inspector's education and experience, conclude that the facts indicate an impending accident or disaster, threatening to kill or to cause serious physical harm, likely to occur at any moment, but not necessarily immediately? The uncertainty must be of a nature that would induce a reasonable man to estimate that, if normal operations designed to extract coal in the disputed area proceed, it is at least just as probable as not that the feared accident or disaster would occur before elimination of the danger.

Western Slope argues that the government's evidence in support of the immediacy aspect of an imminent danger charge was weak. I must agree. There is no dispute that several elements beyond an accumulation must be present before float coal dust can burn or explode. First, the dust must be in suspension. Second, there must be an ignition source, a fire or spark. The parties agree that at the time in question no dust was in suspension. The Secretary argues that the evidence shows that small adjustments in the mine's mechanical ventilation, or even a miner walking down the entry, could raise dust from the floor, quickly changing that situation. To that extent, the Secretary makes out an arguable case, even granting that the evidence shows that miners rarely had occasion to walk in the return entries cited.

The true difficulty lies in the evidence concerning the potential for a spark. The inspector professed a belief that the presence of excessive methane gas intensified the coal dust hazard, because a methane ignition away from the dust area could put the dust in suspension and at the same time ignite it. On this issue I must share Western Slope's skepticism since none of the inspector's notes taken contemporaneously with the inspection mention the 5 percent methane figure which he stressed in his testimony. All the figures recorded in the notes were within admittedly acceptable (and presumably non-explosive) limits. 3/ The inspector may have achieved a high reading in the gob area behind the machine, but I must wonder why it was not significant enough to record at the time it was taken, when much lesser figures were written down in the inspection notes.

3/ The mandatory standards at 30 C.F.R. § 75.308 and 30 C.F.R. § 75.309(a) require withdrawal of miners when monitoring reveals 1.5 volume percentum of methane at the face or in a split of air returning from a working section. It is apparent from the record that the inspector did not believe that the circumstances warranted action under these sections. Rather, he regarded the entries where he recorded readings as return air courses under 30 C.F.R. § 315-2(d), which permits a maximum of 2.0 volume percentum (Tr. 29).

The evidence plainly indicates that there were no ready sources of ignition in the cited entry proper. There were no machines or equipment, no electrical wires or cables, and no miners had reason to walk through the entries. The most likely ignition sources were in the longwall area which intersected the entries. An undetected defect in the longwall mining machine itself, or in the electric motors driving the conveyor, could presumably generate a spark. I must find, however, that the likelihood of an ignition from ongoing mining was not great at the time of the order because the longwall equipment was down for repairs. The operator's evidence on that point is convincing. 4/

There is a possibility, of course, that repair activities could somehow have generated a spark. Foreman Neil indicates that some welding was necessary at the stage loader at the far end of the longwall (Tr. 50). The stage loader, however, was 428 feet from the nearest dust accumulation. Furthermore, had the inspector believed that the repair activities posed an immediate ignition danger, his withdrawal order surely would have encompassed the longwall area. It did not, however. Only the entryways were covered; he allowed work to continue at the longwall.

The Secretary did not argue that the circumstances in this case offer a parallel to the case where an inspector issues a withdrawal order even though an operator has already withdrawn its miners voluntarily. Such orders are proper because of the possibility that a voluntary withdrawal, which lacks the force of law, may be revoked at any time by the operator. Eastern Associated Coal Corp. v. IBMA, 491 F. 2d 277 (4th Cir. 1974). Had the inspector in the case at hand closed down the longwall area, a similar argument could be made. He did not, however, and there is thus no parallel.

From all the evidence I must conclude that while there was an improper accumulation of float coal dust, such accumulation, under all the circumstances, did not constitute an imminent danger. The possibility that the dust would be both raised into suspension and ignited was simply too remote to create a likelihood of an explosion or fire "at any moment." 5/

4/ In so finding, I do not overlook the inspector's testimony that although the conveyor motor was not running, it had been running recently because it was warm to the touch. I question whether such a detail would have been noted when the inspector was confused as to whether there were two motors or one.

5/ Perhaps the lack of convincing evidence supporting an imminent danger was due to the inspector's apparent belief that every float dust violation is per se an imminent danger. I find no support in the law for such a belief.

V

The Secretary alleges that the accumulation of float coal dust constituted a "significant and substantial" violation under the Act. 6/ The Secretary may appropriately allege such a special finding in connection with a section 104(a) violation. Cement Division, National Gypsum Company, 3 FMSHRC 822 (1981). That case also defines a significant and substantial violation as one where "... there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature."

The "imminent danger" and "significant and substantial" concepts share a common element: the degree of possibility that a hazard will result in a death or serious injury. That is not to suggest, however, that the tests are the same; clearly, they are not. The hazard constituting an imminent danger must offer a momentary likelihood of an accident if mining continues. In the hierarchy of hazards, the significant and substantial finding requires considerably less: simply a reasonable likelihood that a serious injury may occur. No element of immediacy is necessary.

In the present case, had the accumulated float dust exploded, death or severe injury would have been probable for any miners in the west side of the mine. The potential for severe injury, if an explosion were to occur, is therefore plain.

Although I found insufficient evidence of an impending or momentary likelihood of a suspension and ignition of the dust, I must conclude that the evidence meets the lesser test of a "reasonable likelihood" of such an event. Some element of danger is present whenever an unlawful accumulation of coal dust exists. Congress recognized this by forbidding accumulations in the 1969 Coal Act itself, rather than leaving the matter to the Secretary's mandatory standards alone. I am convinced that the presence of a sizeable repair crew working in the longwall created a reasonable, though not an imminent, likelihood of an accident.

6/ Section 104(d) of the Act provides that where an inspector finds "... a violation of any mandatory health and safety standard, and if he also finds that, while the conditions created by such violation do not cause an imminent danger, such violation is of such a nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard ... he shall include such finding in any citation given to the operator under this Act." (Emphasis added.) Section 104(e) of the Act permits a withdrawal order after a series of significant and substantial violations which establish a "pattern of violations."

We now consider an appropriate penalty for the violation itself. 7/ Section 110(i) of the Act requires the Commission, in penalty assessments, to consider the operator's size, its negligence, its good faith in seeking rapid compliance, its history of prior violations, the effect of a monetary penalty on its ability to remain in business, and the gravity of the violation itself.

Stipulations of record show that at the time of violation the mine employed 239 persons, and at the time of hearing 90; that it had a history of 27 prior assessed and paid violations; and that assessment of a reasonable penalty would not impair its ability to remain in business. These elements weigh against Western Slope in the penalty calculation, as does its moderate negligence in allowing the accumulation to exist for at least those hours since the last mining took place.

The evidence also shows, however, that the operator rapidly abated the hazard by rock dusting. More important, the record demonstrates that the gravity of the violation was considerably less than alleged. The amount of accumulation, though violative, was not extensive. The likelihood of an impending or momentary accident was remote because there was only the slim possibility of a simultaneous suspension and ignition of explosive quantities of dust.

For this last reason I must conclude that the $960.00 penalty sought by the Secretary is excessive. On balance, I hold that a penalty of $250.00 is appropriate.

CONCLUSIONS OF LAW

Upon the entire record, and in consonance with the factual findings embodied in the narrative portion of this decision, it is concluded:

(1) That the Commission has jurisdiction to decide this matter.

(2) That Western Slope violated the mandatory standard published at 30 C.F.R. § 75.400.

(3) That the violation was "significant and substantial."

(4) That $250.00 is the appropriate penalty for the violation.

(5) That the violation found to exist did not constitute an imminent danger under the Act.

7/ Despite the fact that the withdrawal order was unwarranted, the underlying float coal dust violation alleged under section 104(a) of the Act was proved, and a penalty must therefore be imposed. Cf. Island Creek Coal Company, 2 FMSHRC 279 (1980).

ORDER

Accordingly, the withdrawal order issued December 17, 1980 is ORDERED VACATED; the Secretary's 104(a) citation alleging violation of 30 C.F.R. § 75.400 is ORDERED AFFIRMED; and Western Slope is ORDERED to pay a civil penalty of $250 in connection with such affirmed citation within 30 days of the date of this decision.

John A. Carlson
Administrative Law Judge

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